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NOTES OF INDIAN CASES.

RANI JAGADAMBA KUMARI *v.* WAZIR NARAIN SINGH, 2 Pat. 319 : 44 M. L. J. 503 (P. C.).

This decision of their Lordships of the Judicial Committee is one of great significance as their Lordships consider the applicability of the rule of severance of joint status by the unilateral declaration of an intention to separate to cases of impartible properties. Recently, this question came up for consideration by the Madras High Court in *Annadana Jadaya Gounder* v. *Konammal* (1), a case which is now pending in appeal before the Privy Council. There it was held by Ramesam, J. that the holder of an impartible estate could not by the unilateral expression of his intention to separate, create a divided status between himself and the other members of the joint family in respect of the impartible estate, as otherwise the other members will lose their inheritance at the mere will of the holder for the time being. That this is a circumstance to be borne in mind in the application of the rule to impartible estates is made clear in the Judgment of the Privy Council itself. The decision of the Privy Council is not necessarily inconsistent with the view of Ramesam, J. as in the case before the Privy Council the question was whether a junior member became separated by his expression of an intention to separate while in *Annadana Jadaya Gounder* v. *Konammal* (1), the question was whether the Zamindar for the time being can convert the Zemindari as his separate property by the expression of his intention merely. On principle, if the rule is held applicable in one case it is not easy to see why it does not apply in the other. In this connection, it would be useful to remember that the holder of a joint impartible estate can in cases not governed by the

1. (1922) 17 L. W. 107.

Madras Impartible Estates Act, by his own act, deprive the other members of their succession by a gift or will of the estate.

It has some times been said that in cases of joint impartible estates though succession is traced by the rule of survivorship, it is merely a rule of inheritance and that the other members had no pre-existing interest in the estate. It has therefore been considered that the estate in the hands of the successor is liable for the personal debts of the previous holder as his separate property without regard to the purposes for which they were contracted. *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanams* (2), *Raja of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu* (3). Although the case in *Baijnath Prasad Singh* v. *Tej Bali Singh* (4) is one of succession and not one of liability for debts and there are some expressions such as, the right of the other members emerging for the first time on the death of the holder of the estate for the time being, which indicate the absence of a present interest, but the trend of their Lordships' opinion seems to be that the impartible estate was joint family property and that all the incidents of such property would attach except the right to interdict alienations. This view seems to derive confirmation from the case under consideration as the severance of status regarding the impartible estate pre-supposes a pre-existing joint interest in such property. In this view, it may be necessary to reconsider the view in *Zemindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati, etc., Devastanams* (2), and the cases following it. Indeed, the Patna High Court has held in *Raja Sri Sri Shiva Prasad Singh* v. *Beni Madhab Chowdhury* (5) that after the decision of the Privy Council in *Baijnath Prasad Singh* v. *Tej Bali Singh* (4), succession certificate is not necessary in cases of joint impartible estates thus taking the view held in *Nachiappa Chettiar* v. *Chinnayasami Naicker* (6). It may be mentioned here that a Division Bench of the Madras High Court has in a case not yet reported C. M. A. Nos. 85 and 86 of 1921, declined to follow the view held in *Raja Sri Sri Shiva Prasad Singh* v. *Beni Madhab Chowdhury* (5).

The income from joint impartible estate has been held to be the separate property of the holder for the time being and

2. (1909) I L R 32 M 429. 3. (1916) 30 M L J 391.
4. (1921) 43 A 228 40 M L J 387 (P C). 5. (1922) I L R 1 Pat. 537.
6. (1906) I L R 29 M 453.

descendible as such to his widow and not to his agnates. The estate itself in the hands of the last holder was the joint family property of himself and the other members though they had no right to interdict the alienations by the former *Baijnath Prasad Singh* v. *Tej Bali Singh* (4). If so, how could it be that the income was not joint family property surviving to all the other members of the joint family, as in the case of the income of any other item of joint family property ? It may be that it does not become incorporated to the impartible estate partaking all its incidents. Even in this respect, the matter is not without difficulty, because the income may be spent by the holder for the time being at his absolute discretion and pleasure and this can only be by the fact of the income issuing out of the impartible estate which can be disposed of by the holder at his will. The distinctions between the legal incidents of the income from any ordinary joint family property, the property of a Hindu widow holding a limited estate and a joint impartible estate, present a number of anamolies and this decision has not tended to clear them up though an argument based upon them seems to have been presented before their Lordships.

JAI GOPAL SINGH *v.* MUNA LAL, 4 Lahore 140.

The view of the learned Judges in this case that a memorandum of cross objections cannot be heard when the appeal out of which it arose is bad, as barred by time is in accord with the view of the Full Bench of the Madras High Court in *Alagappa Chettiar* v. *Chokalingam Chettiar* (1) where the arguments in favour of the opposing views are fully set out and examined. It strikes us as somewhat strange that the question which as seen from the judgments of the learned Judges in the Madras case is the subject of conflicting decisions is treated as devoid of authority in the case under notice and the previous cases are not adverted to. It is perhaps interesting to notice that though an appeal might have been laid properly and a memorandum of cross objections was properly preferred under O. 41, R. 22 of the Civil Procedure Code, it has been held that if subsequently the appellant dies and the appeal abates, the memorandum of objections cannot be heard. *Murugappa Chettiar* v. *Ponnusami Pillai* (2).

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4. (1921) 43 A 228 : 40 M L J 387 (P C).
1. (1918) I L R 41 M 904 : 35 M L J 236.
2. (1922) I L R 44 M 828 · 41 M. L. J. 304.

BINDESRI PRASAD *v.* BADAL SINGH I. L. R. 45 All. 369 (F. B.).

In this case, a decree was obtained on a mortgage against the executant (a Hindu) and his grandson a minor represented by the grandfather and in execution of the decree, the property was purchased by a stranger. The minor subsequently brought a suit for a declaration that the decree did not bind him as he was not properly represented in the suit his interest being adverse to that of the grandfather. The decree was accordingly held not binding against him and at his instance the auction-purchaser was deprived of possession and property handed back to him. Hence the present suit by the auction-purchaser to recover the price paid from the decree-holder. The question was (1) whether the auction-purchaser had the right to recover the price at all, (2) whether his remedy was by suit or by an application under S. 47. The Full Bench of the Allahabad High Court hold that the purchaser was entitled to claim the refund and that his remedy was under S. 47, C. P. C. Their Lordships rightly held that the decisions that held that apart from O. 21, R. 93, the auction-purchaser had no right to refund of the purchase-money applies only to cases where there was a valid decree and had no application to cases where the decree was a nullity. Where the decree is a nullity, the Court is bound to restore the parties affected to the *status quo* and as such there could be no question but that the auction-purchaser would be entitled to get back his money. If the decree was voidable, the case might stand on a different footing and the auction-purchaser may have a right to be maintained in possession (see 30 Mad. 295). If the view taken by the Madras High Court in 40 Mad. 299 is correct (it has the merit of standardising procedure) the auction-purchaser would be entitled to restitution under S. 144. The Allahabad Full Bench in this case while fighting shy of this conclusion puts his right under S. 47. The difficulty lies in seeing how a process which involves the negation of the decree can be regarded as a process in execution.

GOPI RAM *v.* JEOT RAM, I. L. R. 45 All. 478.

The question in this case was as to whether a right of pre-emption reserved in a sale deed in favour of the vendor, his heirs and representatives could be enforced by the heirs of the vendor. Their Lordships hold that it could not be and base their conclusion on the ground that the contract is vitiated by the rule as to perpetuities. The observations of *Farwell, L. J.* in *South Eastern Railway Company* v. *Associated Portland Cement Company* (1) as well as the House of Lords' case of *William* v. *Wane* (2) which he relies upon seem to be opposed to this view. In so far as it is necessary for a person to rely upon the contract as an estate in land, *i. e.,* to say when he has got to enforce it against a purchaser, the contract is liable to be set aside on the ground of remoteness but when it is not sought to be used in that manner but merely as a contract and the estate remains in the hands of the heir, it is difficult to see why the contract should not be enforced. The rule of perpetuities is a part of the rule of property and not of contract. There is no rule of perpetuties applicable to a contract as such. There is no rule prohibiting a person from entering into contract to operate for any number of generations. The heir will be bound to the extent of the assets coming into his hands. If he possesses the assets, the assets will be bound. If he does not, they will not be bound. So far as *Eagala Nagappa* v. *Munuswamy* (3) is concerned, that proceeds upon a view of these options which is irreconcilable with the assumption that they are interests in land, the view taken being that they are mere offers which may be revoked at any time. The objection we take to the case under review applies equally to *Dinakara Rao* v. *Narayana* (4). The case in *Kolathu Aiyar* v. *Ranga vathiar* (5) did not contain a covenant binding the covenantor and his heirs. It may be right enough in such a case not to presume a perpetual covenant. The question is as to what is to happen if there is such a perpetual covenant.

BHAGWAN DAS NAICK v. MAHADEO PRASAD RAI, I. L. R. 45 All. 390.

Although the decision in this case may be right on the facts, some of the observations seem to be too wide. The debt was

1. (1910) 1 Ch. 12. 2. (1883) Challis Real Property 2nd Edn. Appx. V.401.
3. (1922) 42 M. L. J. 432. 4. (1905) I. L R 2 Q.B 357.
5. (1912) I L R 38 M 114.

incurred for the purpose of a litigation to secure certain property claimed to be family property. The family did not secure the property by the litigation. The question was whether such a debt bound the family. Their Lordships held, the suit was a speculative suit meaning thereby apparently that it was a frivolous suit. But they go on and say further that the debt would bind only if it was incurred for the purpose of protecting the estate in possession. This would seem to be going too far, whether in the case of the widow or the managing member, more in the latter case than in the former. The property might have been taken possession of, a day before the death of the last owner the suit may fail on some technical ground or on a question of limitation. The suit might succeed in two Courts and fail ultimately in Privy Council or again if the principle is sound, the litigation in respect of mortgages or other similar claims also must stand on the same footing. Under those conditions, the position of the manager should be very risky. Before he undertakes litigation for the purpose of recovering property *bona fide* believed to be family property, he must be in a position to insure success or he must prosecute the suit at his peril. The whole question should be merely as to whether the litigation was reasonable— and whether it was in respect of the estate. It is as much protection of the estate when you sue for it though not in your possession as when you sue for it or be sued for it when you are in possession. That circumstance is material only in deciding on the question of reasonableness. You might be in possession of property and yet the title might be too clearly bad and in those circumstances, it would be quite wrong to support a debt incurred for litigation to protect such possession.

VILAYAT HUSAIN *v.* MISRAN, I. L. R. 45 All. 396.

The suit in this case was by the heirs of an ostensible vendee for possession, the defendants claiming that they are the real owners and that the sale-deed they executed in favour of the deceased was benami with a view to defraud creditors. The question was whether such a plea was open to the defendants. Their Lordships hold that it is open. It is settled law that it is open to the defendant in possession to plead the fraud of himself and the plaintiff so as to defeat the claim of the plaintiff. But this rule is said to be subject to two exceptions (1) when there is a deed which is to be got rid of

before the defendant could get rid of the plaintiff's claim, (2) when the transaction has been acted upon in a Court of Law and an order has been secured on the footing of the validity of the transaction impeached as fictitious. As to the second point, the following are the authorities. 31 Mad. 485, 10 Mad. 17, 20 Mad. 326, 18 Mad. 378. On the first point 31 Bom. 405, 32 M. L. J. 484. The second point had relevancy to the case as a claim had been put forward by the fictitious purchaser and it had been upheld by the Court. If as suggested in 31 Mad. 485, the rule is the rule of *res judicata* taken with the other rule that a party is not entitled to get rid of the binding effect of a judgment on the ground that it was obtained by collusion between himself and the opposite party, the claim order being *prima facie* only between the creditor and the claimant, it would not have barred the plaintiff. The other point also had relevancy in the case. Here again the point is not noticed. *Taylor* v. *Chester* (1) and *Herman* v. *Jeuchner* (2) are not quite relevant. In the first, it was the plaintiff that had to rely upon illegality. The second was a case of contract not under seal where illegality is pleaded as a defence. Here the question was one of conveyance. It is on the existence of the deed which is to be got rid of that the whole distinction turns. But we agree with the Allahabad High Court that *Roberts* v. *Roberts* (3) has no application to India. In England with the distinctions between relief in equity and in common law, one had to get rid of a deed, before you could plead his title. In India, a sale vitiated by illegality is a void sale and conveys no title. It is not necessary to have it formally *set aside* or *cancelled*. There is no difference in this country between a conveyance by deed and oral conveyance, all standing on the same footing. In those circumstances even in cases of deed, the right rule to be laid down is that illegality is pleadable in defence even in such cases. But it is very difficult for English lawyers to get rid of the old prepossessions. This aspect of the case is noticed by Sir Charles Sargent in *Babaji* v. *Krishna* (4) but ignored in the subsequent Bombay case as well as the Madras case referred to.

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1. (1869) L R 4 Q B 309.
2. (1885) 15 Q B D 561 (C. A).
3. (1819) 2 B and Ald. 368.
4. (1893) I L R 18 B 372.

MOOL CHAND *v.* MUL CHAND, 4 Lahore 142.

It was held in this case that if a suit were brought for a debt or other demand due to a partnership and some of the partners died pending the suit, the suit could proceed to judgment wihout the legal representatives of the deceased person being brought on the record and that the suit would not abate for that reason. After the enactment of the Code of 1908 which contains O. 30 R. 4 among its provisions, this proposition cannot admit of any doubt. But a question has been raised whether that rule is restricted in its operation to suits brought in the firm's name by two or more of the partners under O. 30 or whether it extends to all suits by the partners. In the case of *Bal Kishen Dass* v. *Kanhaya Lal* (1), it was held that the scope of the rule need not be so restricted. Without any reference to it in the judgment, a later case of the Calcutta High Court has held in *Manmohan Panday* v. *Bidhu Bhusan Ray Chowdhury* (2) that the rule can only apply to suits in the firm name as conemplated by O. 30, R. 1. We venture to submit that this ruling is open to question. For where a suit is brought in the name of the firm, the firm's name is used only as a compendious method for denoting those persons who compose the firm and such a suit does not differ in any material respect from a suit by them in their individual names. See per Lindley, L. J., in *Western National Bank ofCity of New York* v. *Perez Triana and Co* (3) and per James, L. J. in *Ex parte Blain In re Sawers* (4). Further, as pointed out by Farran, J. in *Motilal Bechardass* v. *Ghellabhai Hariram* (5), it is open to a surviving partner to collect the debts of a dissolved partnership and can give a valid discharge for the same under S. 263 of the Contract Act and there can be no objection to the suit going on as though the suit had been instituted by the surviving partners alone. All that could be said for the opposite view before the enactment of the Code of 1908, was clearly brought out by Farran, J. in that case. The only Court which held under the old Code of 1882 that the suit could not proceed was the Calcutta High Court in *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (6). It was only with a view to enact the law as understood by the other High Courts and in England, that O. 30, R. 4 was introduced, though it may be mentioned that its language might have been clearer.

1. 17 C L J 648. 2. 28 C L J 268. 3. (1891) 1 Q B 304 at 314.
4. (1879) 12 Ch D at p 533. 5. I L R 17 B 6. 6. I L R 18 C 86.

MUHAMMAD UMARKHAN *v.* UMMATUL RAHIM, I. L. R. 45 All. 376.

The question in this case was as to whether a suit by one of the heirs of a Muhammadan to recover his share in a certain property ostensibly sold by the deceased to a third party but claimed to be a fictitious transaction barred a subsequent suit for the recovery of his share in other properties not so sold under O. 2, R. 2. Their Lordships held that it did not, and we think rightly. To start with, the parties to the two suits were different and a condition precedent to the application of that rule is that the parties should be the same and as their Lordships point out, the facts, that have got to be proved in the two suits are not the same. It may be noticed however that there was nothing to prevent the two claims from being combined in one suit. The claim in the first suit was not that the sale was procured by fraud but that it was fictitious, *i. e.*, to say no title passed to the so-called vendee.

YAD RAM *v.* SUNDAR SINGH, I. L. R. 45 All. 425 (F. B.).

In *Sundaram v. Mamsa Rowther* (1) the Madras High Court held that the erroneous dismissal of an application under O. 21, R. 89 by the judgment-debtor on the ground that he had sold the property and as such was not entitled to apply thereunder was revisable under S. 115, C. P. Code. In the case under review the Allahabad High Court held that they could not revise such an order under the section. In this case, the first Court had held in favour of the applicant's right, the appellate Court against. No point was however made of that circumstance The curious feature is that both the Madras and the Allahabad High Courts rely upon *Balakrishna Udayar's Case* (2). The decision on a point of limitation in a suit or on a point of title against the plaintiff even on a question of law would not entitle the plaintiff to come up in revision. It *prima facie* looks an anamoly that in these applications it should be otherwise. But the distinction is clearly recognised in proceedings by way of prohibition in England in respect of Courts of limited jurisdiction. If they act in excess of their jurisdiction by reason of an error of law, the writ is issued but not so if the error is one

1. (1921) I L R 44 M 554 40 M L J 497 (F B).
2. (1917) I L R 40 M 793 : 33 M L J 69 (P C).

of fact. The various powers conferred on the Court of setting aside sales are all in the nature of limited powers. If the Court acts in excess of the powers, the High Court can interfere under S. 115. In 19 Cal. 8, the Privy Council upheld the order of the High Court interfering in revision with an order setting aside a sale at the instance of a party not entitled to come in under S. 311, C. P. C. (O. 21, R. 90). In *Bala-Krishna Udayar's case* (2), the District Court had jurisdiction to act in the matter. The error of the District Court was in acting in the manner it did, *i. e.*, to say asking the Committee to hold an election or to confirm the appointment of a person so elected after three months from the date of the vacancy.

KEDARNATH SINGH *v.* SHEO SHANKER, I. L. R. 45 All. 55.

The point in this case has been decided by the Privy Council in *Pittapur Raja* v. *Butchi Sitayya* (1). A decision between the same parties in a previous suit is *res judicata* although the two suits relate to different properties. A sale deed comprised certain moveables and certain immoveables. In a suit in respect of the moveables, it was decided that the sale was brought about by undue influence and was therefore invalid. It was held that this decision operated as *res judicata* in a subsequent suit between the same parties in respect of the immoveables. There is some serious difference of opinion when the decision relied upon is not an actual decision but an implied decision under S. 11, Explanation IV. There is none such where there is an express decision and there could be none such in the face of the judgment of the Privy Council above referred to.

RAM CHUNDER *v.* MUHAMMAD NUR, I. L. R. 45 A. 545.

In view of the judgment of the Privy Council in *Raja Brij Narain Rai* v. *Mangla Prasad Rai* (3) that the pious obligation of the son exists even during the life-time of the father and the share of the son is liable to be seized in execuion of a decree upon a debt of the father as held in *Nanomi Babuasin's case* (4), the silght disturbance in the current of opinion

2. (1917) I L R 40 M 793 33 M L J 69 (P C)
1. I L R 8 M 219.
3. (1923) 46 M L J 23.
4. L R 13 I A 1.

caused by *Sahuram's case* (1) and *Chetram's case* (2) must be taken to be set right and a complete *status quo ante* must be taken to be established except to the extent that a mortgage as such cannot be enforced unless it is supported by an antecedent debt—antecedent not only in point of *time* but also antecedent in point of *fact*.

LAL RAM SINGH *v.* DEPUTY COMMISSIONER OF PARTABGARH, I. L. R. 45 All. 596 (P. C.).

In this case, the question that has divided the Courts in India, *viz.*, when a property is devised or gifted by a Hindu father to his son, whether the son takes it with the incidents of ancestral property or as self-acquisition came up for discussion before their Lordships. Their Lordships were able to decide the case without deciding this question. The property was one governed by special rules of devolution and disposition laid down by the Oudh Estates Act and not property governed by the rules of the Mitakshara Law and as such their Lordships held that the assumption on which the rule is based, namely, that the donee takes what he would otherwise have taken by descent, did not apply to the case. Their Lordships say that if the question arose directly for decision, they would go back to the Mitakshara and decide on its language. The question is a difficult one. There is first the principle of the Mitakshara that the son takes an interest by birth even in the self-acquisition of the father–the term " son " including " grandson" and " great-grandson " also and elaborate rules are laid down for partition of father's self-acquired property. It is the obvious intention of the Mitakshara that property which is partitioned during the lifetime of the father should be regarded as ancestral property as much as that property would be regarded an ancestral property if the partition is made after the death of the grand-father. In partitions the father represents his sons. As regards property allotted to a son in partition, there is very strong reason to hold that the property is ancestral property so far as his sons are concerned. Certain properties among others—property given by the father out of affection is exempted from partition. On the other side, property acquired " at the detriment of the *Pitr Dravya* " is said to be subject to partition. The Mitak-

1. (1917) I L R 39 A 437 (P C). 2. (1922) I L R 44 A 368 (P C).

shara does seem to make a distinction between moveables and immoveables and gifts from affection or religious duty and other gifts. The power to gift is intended only to apply to moveables. On the view adopted at present, that the father can give away immoveable property, gifts of immoveable property also may come within the exemption. But the exemption from partition is only as between brothers. It does not apply to partition between the donee and his sons. The question then is whether on the rule of construction adopted by all the leading commentators the rules apply to all partitions whether between collaterals or between father and sons. The rule is known as Upalakshana. But such a wide interpretation does conflict with the other rule as to right by birth of the son. Assuming it does apply to all partitions, then the question would be as to whether the gift is to the father individually or to the branch. The presumption should be that it is to the branch. The mere fact that power of alienation is given to the grantee cannot exclude the presumption as power of alienation is put in generally as descriptive of the estate conferred, *i. e.*, to say whether it is an absolute estate or a limited estate. There was another point in the case. The father gave the remainder to the son on these terms "L, his heirs and representatives shall succeed to the entire estate as provided by S. 22 of Act I of 1869." Act I of 1869 did not apply to the case in the events that had happened. The question was what interest the son took. The argument was that it was an attempt to create an estate that cannot be created under the law and therefore wholly invalid. The alternative argument was that it would give a life estate to the son the gift beyond being invalid. Their Lordships acting on the principle of *Ut res magis valeat quam pereat*, treat the words "heirs and representatives" as words of limitation and disregard the later words as an idle attempt to derogate from the grant previously made or as words of description involving a mis-statement of the legal consequences which did not matter.

SAHIB SINGH *v.* GIRDHARI LAL, I. L. R. 45 All. 576.

We respectfully agree with the judgment in this case that it is not sufficient for a private vendee from the father in possession under the sale, to put forward a sale deed to put the son on proof that the sale is not binding. To bring the case within the rulings of the Privy Council, the sale must be not merely ostensibly for antecedent debts but actually so—the burden of proving which would be on the purchaser. Nor do we think that the fact that there is an antecedent debt will justify the sale. It must be shown that the sale was necessary in the sense that the sale was for adequate consideration and that the debts could not be met from the other available resources. There is a fallacy going round that necessity and antecedent debts are mutually exclusive terms. It is stated some times that a sale is good if supported by antecedent debt. There is no justification in any of the observations of the Privy Council for such a theory. If that theory is right, the existence of any the slightest antecedent debt would justify a sale if the sale purports to be only for the amount. An antecedent debt need not be beneficial to the family, in other words, it is in itself an item of necessity. There is no warrant for giving it a higher place. Just as the existence of an item of necessity is not sufficient to justify a sale when there are other resources available or when the sale is for inadequate consideration, an item of antecedent debt also is in similar circumstances insufficient to justify a sale.

SHAMAN *v.* ABDUS SAMAD ; I L R. 45 All. 548.

The question in this case was whether the Court can when considering the application for leave to sue in *forma pauperis* take evidence as to the merits of the case. The point has been decided in the contrary sense by a Full Bench of the Madras High Court in *Rathnam Pillai* v. *Pappa Pillai* (1).

MUHAMMAD SIDIQ *v.* ANWAR-UL-HASAR I. L. R. 45 All 563.

The question in this case was whether a notice given by a person to the Court of Wards would enure for the benefit of the representatives on his death. The name of the plaintiff is one of the essentials to appear in the notice. As pointed out by Mr.

1. (1902) 13 M L J 292 (F B).

Justice Mukerjea in 40 C. 503, it is not necessary that notice should be signed by all the plaintiffs but the notice must contain the name of all the plaintiffs—the change of language from intending plaintiff to plaintiff seems to be significant. The wide meaning given to a "cause of action" in this case seems to be opposed to 25 All. 187 and 24 M. 179. Nevertheless, as the section directs the name of the plaintiff to be given and as having regard to the object of the section, it is a material circumstance to be known for the purpose of making amends, the view taken in the case seems to be right.

BISHAMBAR NATH *v.* MUHAMMAD KHAN I. L. R. 45 All. 581.

The point in this case was about the construction of a document, whether it was a mortgage or a sale with a clause for re-purchase. Three circumstances were relied upon to show that it was a mortgage :—(i) at the time of the re-purchase, the vendors had to pay in addition to the purchase money arrears of rent that might be outstanding against the tenants ; (ii) one of the parties was a Muhammadan, (iii) there was a clause that the vendor should indemnify the vendee for any loss from any undisclosed encumbrance. These circumstances were held not sufficient to justify the construction that it was a mortgage. There was a further contention based on S. 58 (c) of the Transfer of Property Act that such transactions were mortgages by force of that section. This contention was rejected in the Madras Full Bench case 42 M. 407 though the referring judges were in favour of it.

JHARI KOERI *v.* BIJAI SINGH I. L. R. 45 All. 613.

The point in this case was about the quantum of interest that passes in execution of a money decree against a Hindu widow for rent due on the holding belonging to the estate. There is a volume of judicial decisions on the subject. Many of the decisions are complicated by (i) peculiarities of saw as to rent recovery, different proceedings available for the purpose of reaching the tenure and reaching the interest of the defendant, (30 C. 550,P.C.). (ii) by the language of the Civil Procedure Code of 1859,(iii) by considerations of the personal default of the widow which threw the primary obligation on her and which naturally pre-disposed the Coorts in favour of a strict construction in the absence of surrounding circumstances point-

ing clearly to the contrary. The present case had not the first two complications. To the third, the Court does not seem to advert sufficiently but it must be conceded that that fact cannot matter if it is clear on the terms of the proclamation and the sale certificate and the whole interest was intended to be sold. Their Lordships had not to decide the point finally as the plaintiff was a trespasser who had ousted the defendant while in possession and as against him the purchaser could clearly recover on the finding that he had purchased the entire tenure. Their Lordships held that the principles applied to private alienations of the entire estate, namely, that they are only voidable and hold good as long as the reversioner does not choose to disaffirm apply equally to Court sales in execution of decrees against widows.

JAGANNATHA SASTRI *v.* SARATHAMBAL AMMAL, 46 M. 574 : 44 M L J 202.

In coming to the conclusion that it was obligatory on the Court to issue a commission in cases falling under O. 26 R. 4 we venture to think that the learned Judge was only following the decision of a Division Bench in *Sitamma* v. *Subraya* (1), which sitting as a single judge he was obliged to follow. When the question again comes before a division bench, the soundness of *Sitamma* v. *Subraya* (1), may have to be reconsidered.

As was laid down in *Veerabadran Chetty* v. *Nataraja Desikar* (2) the power to issue a commission is given by O. 26 Rr. 1 and 4 and the limits of the power depend on the provisions of those rules. Ordinarily a party has to bring before the Court trying his cause, the witnesses on whose evidence he wishes to rely in support of his case and he has no right *ex debito justitiae* to have a commission for the examination of witnesses, *Coch* v. *Allcock* (3). If therefore he has no right to the issue of a commission, there is no reason why the permissive provisions of O. 26 R. 4 which merely enable the Court to issue a commission should be taken to impose an obligation on the Court to issue a commission when the legislature has used the word " may " and not " shall ". As was pointed out by Lord Blackburn in the leading case of *Julius* v. *Bishop of Oxford* (4), the word " may " has an imperative significance when the act imposed is one for the effectuation of a legal right in a party and this as we have pointed out is absent. Even

1. (1911) 21 M L J 889. 2. (1904) I L R 28 M 28.
3. 21 Q B D 178 4. L R 5 A C 214.

before the power to issue commissions was enacted in the rules of the Supreme Court, O. 37 R. 5 it was understood that the power to issue a commission for the examination of witnesses was only discretionary when the language of the English statute was "it shall be lawful" to issue a commission See *Ducket* v. *Williams* (5), and *Castelli* v. *Groome* (6). These decisions have been considered to be correct even after the elaborate consideration given by the House of Lords in *Julius* v. *Bishop of Oxford* (4) to the words "may" and "shall be lawful" in the construction of statutes. See Stroud's Judicial Dictionary, 2nd Edn., p. 1179.

Again, authority even in Madras prior to *Sitamma* v. *Subraya* (1), was in favour of the view that the provision in the Code of 1882 corresponding to O. 26, R. 4 was only discretionary. See *Veerabadran Chetty* v. *Nataraja Desikar* (2) and *Maruthamuthu Pillai* v. *Krishnamachariar* (7). Apart from the circumstance that the view of the Calcutta High Court is to this effect as noticed by the learned Judge in the case under notice, the attention of the Madras High Court in *Sitamma* v. *Subraya* (1), does not seem to have been drawn to the prior decisions of the same Court.

We only wish to submit that when the learned Judge observes that a commission may not be ordered if the witness is under the power of the party applying for commission though he may be more than 200 miles from the Court-house, his Lordship does not give imperative effect to the provision in O. 26, R. 4. Further if imperative effect is to be given to "may" in O. 26, R. 4 we should have to go to the full length of saying that even if the witness was residing less than 200 miles away from the Court-house, the party is entitled as a matter of right to a commission for the examination of the witness under O. 26, R. 4, sub-R. (*a*) if only he was outside the local limits of the jurisdiction of the Court. Besides we can see no justification whatever for the issue of a commission to a person ill or suffering from an infirmity under O. 26, R. 1 or under the provisions of O. 26, R. 4 unless the Court is satisfied that the witness is going to speak to some relevant facts in the case and that he cannot be brought before the Court by the party desiring to have his evidence, as otherwise the Court will be obliged to issue commissions to every person beyond 200 miles and each and every sickly person.

5. 9 L J Exch (O S) 177.
6. 21 L J Q B 308.
4. L R 5 A C 214.
1. (1911) 21 M L J 889.
2. (1904) I L R 28 M 28, 35.
7. I L R 30 M 143.

RAHMAT ALI MUHAMMAD FAIZI *v.* DEWA SINGH MAN SINGH, 4 Lahore 151.

In this case a debt due under a Hundi was renewed under a later Hundi which was not duly stamped and the learned Judges held that a suit could be maintained on the prior Hundi when a suit on the latter had been dismissed as it was inadmissible in evidence. It is well settled that when an improperly stamped bill or note is given for a debt due, it cannot amount to a conditional payment of the debt and the payee need not even present the bill or note for payment and that a suit can therefore be maintained on the original debt ignoring the new bill or note altogether. See *Cundy* v. *Marriot* (1) ; *Brown* v. *Watts*(2) ; *Wilson* v. *Vysar* (3), and the other cases cited in 7 Hals. S. 917 and 10 Encyclopedia of the Laws of England 2nd edition p. 655. In such a case, therefore, the original cause of action would not even be suspended until the dishonour of the bill or note and cases like *Kuttayan Chetty* v. *Palaniappa Chetty* (4) have no direct application to the circumstances of this case. We therefore, venture to think the ground on which the learned Judges rested their judgment may not be strictly correct, though the decision itself would be correct on the ground stated by us.

In this connection, we may observe that the question where one contract is rescinded by another contract which though valid in law is not capable of enforcement in Courts, as by reason of its not being reduced to writing or on account of its want of registration or because it is not properly stamped in cases where it is in writing, whether there is a valid rescission in law by reason of the substituted agreement, was not quite settled till the decision of the House of Lords in *Morris* v. *Baron and Co.*(5). In that Case, their Lordships laid it down authoritatively that in such cases, there is a valid

1 B & Ad 696.

2. 1 Taunton 353.

3. 4 Taunton 288.

4. I L R 27 M 540.

5. (1918) A C 1.

rescission in law of the old contract even though the new agreement may be incapable of enforcement. In such cases, it may be, as pointed out by Lord Haldane in this decision, that the non-enforceability of the new agreement would be a material fact in arriving at a conclusion on the question whether the new agreement without performance was taken in accord and satisfaction of the old. But when once the novation is established as a matter of fact, the unenforceability of the new contract does not keep the old contract subsisting. The House of Lords in this case, expressly disapproved of a statement of law to the contrary in *Williams* v. *Moss Empires Limited* (6). It may be that if the new agreement is unlawful or void as distinguished from being merely unenforceable, the old contract might still subsist and might not have been validly rescinded in law.

RANJIT SAHI *v.* MAULAVI MUHAMMAD QASIM, 2 Pat. 432.

If the question that arose in this case, as to the value for the purpose of jurisdiction of a suit for a partition of joint family properties where the plaintiff's right to share is not disputed and he is in joint possession, were to arise before the Madras High Court, that Court would have held that the plaintiff would be entitled to value the suit at his pleasure. Such a suit according to the decision of the Full Bench in *Rangiah Chetty* v. *Subramania Chetty* (1) will fall under S. 7 IV (*b*) of the Court Fees Act. in which case the plaintiff can according to the Madras rulings place his own valuation on the suit and that will govern the valuation for the purpose of jurisdiction also under S. 8 of the Suits Valuation Act.

MATHURANATH MUKERJEE *v.* LAKHI NARAIN GANGULY I L R 50 C 436.

Now that the rule in the Tagore case has been practically abrogated by statute the decision in this case with reference to the inapplicability of the principle of *Bai Motivahoo* v. *Bai Mamoo Bai* (1) to an appointment to a trusteeship is not likely to be of much practical importance hereafter. There are however some steps in the reasoning which may have other bearings as well and in that view, have to be briefly noticed. The founder's will did not lay down that *every* trustee should in turn have a power to appoint his successor ; the authority was conferred only upon his widow who was the first trustee. It therefore seems to us open to doubt whether the power of appointing a successor could in this case be regarded as an *incident* of the office itself. In the case of private property, for instance, it is possible to have a life interest accompanied by a power of appointment. It cannot in such a case be said that the power is incidental to the life estate ; the exercise of the power will confer a title on the appointee not as if it were derived from the donee of the power but as one from the donor. We rather think that in the case under notice the second trustee must be similarly deemed to get his title by appointment made by the donor himself though through the medium of the first trustee. In this view it is difficult to see why the limitation imposed by the Tagore case which according to *Bai Motivahoo* v. *Bai Mamubai* (1) equally applies to the exercise of a power of appointment should not equally govern the exercise of the power here. The distinction founded on its being a trusteeship does not appear to us, sound. The Judicial Committee in *Gnana Sambhandha* v. *Velu Pandaram* (2) laid down that the principles laid down in the Tagore case with reference to property will equally apply to an office and whether the office is hereditary or not cannot affect this principle. It is no doubt open to a founder to lay down a rule of succession for the management of the endowment that he may create, but this he can do only in acocrdance with other established rules of law. Reference may be made by way of illustration to *Gopal Chunder Bose* v. *Kartick Chunder Dey* (3) where a direction vesting the management of an endowment in the donor's daughter and her male children *successively* was held invalid beyond the first generation of the male children.

1. (1897) L R 24 I A 93 : 21 Bom. 209. (P. C.)
2. (1899) I L R 23 M 271 (P. C.)
3. (1902) I L R 29 C 715 (P. C.)

AHIDANNESSA BIBI v. ISUF ALI KHAN, I. L. R. 50 C 610.

The propriety of applying Art 62 of the Limitation Act to suits between co-heirs seems to us open to doubt ; and the fact that the defendant collected the debt in question on the strehgth of a succession certificate only makes the plaintiff's position in this respect stronger, though that may not suffice to make the defendant a trustee. Assuming that the co-heir's suit for a share in such a case cannot be brought under Art. 123 it will not necessarily follow that it will fall under Art. 62. The co-heir's possession of immoveable property will not in the absence of conduct amounting to ouster be *adverse* to the other heirs. Though there is no question of adverse possession in respect of moveables, it cannot be denied that when one heir collects the debts due to the estate, his action is *prima facie* in a representative character and at any rate not wrongful so far as the shares of the other heirs are concerned. In the absence of a succession certificate the debtor may be entitled to insist on all the heirs being parties to the suit but the succession certificate precludes the debtor from raising any objection on the score of non-joinder and to this extent the suit or collection must really be construed to be in a representative character. The reasoning of the Madras Full Bench in *Yerukola* v. *Yerukola* (1) and of the Bombay High Court in *Gabu* v. *Zepru* (2) is clearly inconsistent with the basis of the present decision.

RAMA NANA *v.* DHONDI MURARI, I. L. R. 47 Bom. 678.

A Hindu widow's right to surrender her husband's estate having so long been recognised, it is rather strange that there should be no authority as to the effect of such surrender on the widow's power of adoption. We are not satisfied that the reasoning in the present case is either conclusive or convincing. It does not appear whether the learned Judges were prepared to hold that the subsequent adoption was altogether *invalid* on the ground that the widow's power to adopt had come to an end with the surrender. This aspect of the matter is not without practical importance because it is now settled that notwithstanding the surrender the widow may retain her stridhanam property, and the adopted son's right to inherit it

1. (1922) I L R 45 M 648 2. (1920) I L R 45 B 313.

1. (1916) I L R 40 B 429.

may depend upon the validity of the adoption. It will be too much to contend that on a surrender, the widow ceases to be her husband's widow, as, for instance, in the case of a remarriage. It has now been laid down in more than one decision that the power to adopt does not depend upon her being in possession of her husband's property. And it is difficult to see anything in the circumstance of a surrender to bring into operation the limitations imposed by *Bhoobun Moyi's Case* (1) or in *Madan Mohan Deo* v. *Purushotam Deo* (2). Taking a case where the adoption is made during the lifetime of the surrenderee himself, it is also difficult to see why *if the adoption be valid,* the adopted son should not divest the surrenderee. The broad proposition stated by Crump, J., that " adoption by a widow cannot divest any estate of inheritance unless the estate is at the time of adoption vested *in the adopting widow* " cannot be maintained in the face of the decision in *Pratap Singh Shivsingh* v. *Agar Singhji Rajasinghji* (3). If as happens in joint families, the adopting widow never took the estate at all and it passed direct from the husband to another male member, an adoption by the widow will undoubtedly divest such taker ; and the decision in *Pratap Singh's case* must be taken to lay down that this result is not peculiar or confined to joint family property. If so, why should it make any difference that the estate has for a time vested in the widow and has then been surrendered to the next heir. The real question is not whether the surrender is invalid and it is therefore no answer to say that in making a surrender the widow is acting within her rights. The point for consideration is what is the result of the surrender. The inheritance has still to be traced to the last male owner viz., the adoptive father and the son claims not as the widow's heir but as his father's heir. The general rule as to divesting is that the adopted son will take his father's estate in preference to every remoter heir. Why should the intermediate succession of the widow orthe later extinction of her estate bar his right of succession to his father when admittedly he does not claim *through* the widow. The fact that during her tenure, the widow is not a trustee for the future adopted son or that she could for necessary purposes alienate the estate has no bearing on the present discussion, because that is equally so in any case in which a widow makes an adoption. The surrender only lets in the next heir as the heir of the last

1. 10 M I A 279. 2. (1918) I L R 41 M 855 (P C).
3. (1918) I L R 43 B 778.

full owner and as the adopted son likewise claims on the same footing, cases of *collateral inheritance* like *Bhuvaneswari* v. *Nilcomal* (4) are not really analogous. If the surrenderee takes a full estate and himself dies before the widow makes the adoption, the position may perhaps be different because the surrenderee may then have to be regarded as the last full owner to whom the inheritance should be traced. It will however be possible even in such a case to contend, on the basis of the observation in *Madan Mohan Deo's case,* that the vesting in the surrenderee was itself only provisional and that his heir cannot therefore claim to be in a better position *cf. Jagannatha Deo* v. *Kunj Behari* (5).

SHIDDAPPAH *v.* PANDURANG VASUDEVA, I. L. R. 47 B. 696.

The apparent hardship on the defendant seems to have largely influenced the judgment in this case. When a mortgagee improves the mortgaged property his right in respect of such improvement has *prima facie* to be determined with reference to S. 63 of the Transfer of Property Act. But, as that section itself indicates, its provisions can apply only as between mortgagor and mortgagee, *i. e.,* on the footing that the mortgage is good. Where however a reversioner succeeds in setting aside a mortgage made by the widow, his action is not one for redemption nor does S. 63 apply to him. As against him the mortgagee is only a person without title and having regard to the fact that the mortgagee could never have believed himself to be absolutely entitled to the property S. 51 cannot be invoked either. *Ramalinga* v. *Samiappa* (6). It may be that upon the theory indicated in *Ismail Kani Rowthan* v. *Naizarali Sahib* (7), the person in possession can on eviction remove any building erected by him ; but where he has merely repaired or renewed a pre-existing structure, it is difficult to see how even that principle can be applied in practice. Whether even in a case of a *purchase* from a widow,, S. 51 can be applied as against a successful reversioner is open to doubt. [Cf. *Muddusami* v. *Bhaskara* (8), *Nanjappa* v. *Peruma* (9), *American Society* v. *Ammala Nadhuni* (10) *Narayana Aiyar* v. *Sankaranarayana Aiyar* (11) and *Raja Kishore das* v. *Jaint Singh* (12)].

4. (1885) I L R 12 C 18 (P. C.) 5. (1919) M W N 52.
6. (1889) I L R 13 M 15. 7. (1903) I L R 27 M 24.
8. (1915) 29 M L J 357. 9. (1908) I L R 32 M 530.
10. (1918) 48 I C 859. 11. (1914) 1 L W 389.
12. (1914) I L R 36 A 387.

BOMMADEVARA NAGANNA NAIDU v. RAVI VENKATAPPAYA, I. L. R. 46 Mad. 895 : 45 M. L. J. 657.

In a suit by the landlord against the tenants for exchange of patta and muchilika, certain rates were upheld by the High Court but certain other rates were held to be proper by the Privy Council. After the decision of the High Court and pending the disposal of the appeal by the Privy Council, the Landlord sued for and recovered rents at the rates decreed by the High Court. After the Privy Council decision, the tenants sued the Landlord for the refund of the excess amounts paid on the authority of the erroneous judgment of the High Court and the High Court decreed the same relying upon the Judgment of the Privy Council in *Shama Purshad Roy* v. *Hurro Purshad Roy* (1) and the Judgment of the majority in *Jogesh Chunder Dutt* v. *Kali Charan Dutt* (2). Their Lordships take the law from the former case and say that "money recovered under a decree of Court cannot be recovered back in a fresh suit or action whilst the decree of Judgment under which it was recovered remains in force" and that "the Judgment must be taken to be valid and subsisting till it has been reversed or superseded by an ulterior proceeding. If it has been reversed or superseded the money recovered ought to be refunded. The true question in such cases is whether the decree or judgment has been reversed or superseded." Their Lordships hold that the Judgment of the Privy Council purported only to deal with the subject matter of the suit and not with the subject matter of the later suits. In that view the excess amounts claimed could not be refunded. Their Lordships distinguish the earlier case as one in which the Privy Council purported to deal with the whole subject of the rights of the parties in respect of the bond in question and as such the subsequent decrees made in respect of part of the subject matter must be taken to be superseded by that decree. Garth, C. J., had great difficulty in understanding how the Privy Council could be said to have dealt with the subject matter of the subsequent decrees when the claim in respect of it was expressly reserved by the plaintiff. Anyhow, their Lordships did purport to deal with the whole subject matter and their Lordships in the later case held that it had the effect of superseding subsequent decrees. The true explanation might perhaps be found in the procedure then

1. 10 M I A 203.
2. I L R 3 C 30 (F B).

adopted of trying all claims in respect of a matter whatever the allegations of the plaintiff and the defendant and the cause of action, to which reference will be found made in the earlier volumes of the Moore's Indian Appeals. In 3 Cal. 40 F. B. the majority applied the principle of that decision as they conceived it to a case where the rent had been enhanced by a decree which was ultimately reversed and in the meanwhile decrees had been obtained and rent recovered on the basis of the earlier decision. The present case bore a close analogy to that case. But their Lordships hold that the application of the decision in *Shama Pershad Roy's case* in that case was wrong and the subsequent decree could not be said to have reversed or superseded the intermediate decrees. That practically closes the chapter on defendant and subordinate decrees sought to be deduced from 10 M. I. A. 203.

CHOCKALINGAM CHETTIAR *v.* PALANI AMBALAM, I L. R. 46 M. 712 : 45 M. L. J. 124.

S. 13, cl. (2) of the Estates Land Act is in these terms "Notwithstanding any usage or contract to the contrary, a ryot shall not, by reason of making an improvement at his sole expense become liable to pay a higher rate of rent on account of any increase of produce." The question in this case was whether a contract before the Act to pay a higher rent by reason of improvement "was enforceable when the improvement was effected after the act." In 39 M. 54, Mr. Justice Kumaraswami Sastri expressed an opinion that a contract entered into before the Act was good even though the improvements were effected subsequent to the act. Reading the clause without any pre-possession by reason of canons of construction or otherwise one would be disposed to agree with their Lordships. The section prohibits an enhancement of the rent after the Act. Where no enhancement is involved the contract is not prohibited.

MAHABLESHWAR NARAIN v. SUBRAMANYA SHIVARAM, I. L. R. 47 Bom. 542.

The soundness of the distinction here suggested in respect of the decision in *Dattartraya Sakharam* v. *Govind Sambhaji* (1) seems to us open to question. That an adoption severs the tie in the natural family is of course admitted on all hands ; the *extent* of the severance has to be decided with reference to the texts dealing with it rather than on the analogy either of civil death on the one hand or of disqualification on the other. That the adopted son retains his self-acquired property or that a widow is not divested of her estate by reason of subsequent unchastity affords no parallel ; the analogy, if anything, ought to be found in the re-marriage of a widow, *i. e.*, not the emergence of a mere disqualification but the acquisition of a new status. The text of Manu (Ch. IX, 142) declares the cessation of rights only with reference to '*Janayituh riktha*' (not with reference to the self-acquisitions of the adopted boy) and as there are no other provisions depriving the adoptee of his claim to the estate of his mother, grandfather or other relations in the natural family, the word '*Janayituh*' has to be understood as denoting the 'natural family' generally and not merely the father. The only word in that sloka which has given rise to controversy is the verb '*Haret*,' which in the text as quoted in the Mitakshara reads '*Bhajet.*' It is possible to suggest that the termination here is indicative of futurity and the negation is therefore only in respect of claims accruing *after* the date of the adoption. Again, it is possible to say that the English word 'take' is ambiguous and that while '*Bhajet*' means only *obtain* and can accordingly apply only to what is to be obtained, the word '*Haret*' can be interpreted as 'carry with him' and therefore can be applied even to what is already vested in the adoptee. If once it is held that the the sloka can apply even to what has already vested in the boy to be adopted, on the language of the text, it is impossible to find any reason for a differentiation between what the adoptee has taken as an heir or as the last co-parcener in the natural family and what he has obtained on a partition. The only question is, did it belong to the 'natural family' or not. In *Behari Lal* v. *Kailas Chunder* (2) the Judgment proceeded

1. (1916) I L R 40 Bom. 429.
2. (1896) 1 C W N 121.

more upon analogy and general reasoning than upon the interpretation of the text. In the *Medur Case* (3), the text and its exposition in later works were referred to, but we cannot help feeling that even there the learned Judges have largely been influenced by the principle of *Kerikolian's case* (4) and by the connotation of ambiguous English expressions used in some of the translations referred to. In *Birbhadra* v. *Kalpa-Taru* (5), it was not necessary for the Court to deal with this aspect of the matter and its only importance in this connection is that Justice Mukherjee there adopts the later view of Mr. Sarkar in favour of the wider effect of an adoption.

BOMBAY SIZING AND STORES SUPPLYING COMPANY *v.* KUSUMGAR AND CO., I. L. R. 47 Bom. 674.

The restricted interpretation placed by the learned Judges on the provisions of O. 41, R. 27, C. P. Code, relating to the admissibility in appeal of evidence discovered after the judgment of the trial Court can no longer be accepted as correct, in view of the pronouncement of the Judicial Committee in *Raja Indrajit Pratap Sahi* v. *Amar Singh* (1). Their Lordships themselves have explained the true basis and scope of the ruling in *Kessowji* v. *G. I. P. Ry.* (2) which the present decision purports to follow.

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3. (1905) I L R 29 M 437.

4. (1880) I L R 5 Cal 776.

5. (1905) 1 C L J 388.

1. (1923) 45 M L J 578.

2. (1907) I L R 31 B 381.

NATHU RAM v. DOGAR MAL, I. L. R. 4 Lahore 198.

We have dealt with the question raised in this case, namely, the right of a payee of an improperly stamped hundi given for the balance of account on dealings to sue for the balance, on the accounts, in commenting on the case of *Rahmat Ali Muhammad Faizi* v. *Dewa Singh Man Singh* 4 Lah. 151 ; and reference may be made to 46 M. L. J. (Journal portion) N. I. C., page 17 for that purpose.

MULA RAM *v*. JIWANDA RAM, (1923) 4 Lahore 211.

In this case a lease was granted the object of which was to defeat the creditors of the lessor though there was valuable consideration for a portion of the lease amount which was taken in advance in discharge of the prior indebtedness of the lessor to the lessee. A substantial portion of the consideration was found to be fictitious and the learned Judges set aside the lease *in toto* as fraudulent against the creditors of the lessor followting the well known case of *Chidambaram Chettiar* v. *Sami Aiyar* (1). This case has been accepted to have laid down the law correctly that when a transfer is made, part of the consideration for which is the discharge of the debts of the transferor, if the other portion of the consideration is reserved as a benefit to the transferor himself or is removed from the reach of the creditors and the transferee enters into the transaction with the knowledge of the intent of the transferor so to withdraw it from the reach of his creditors, the transfer as a whole is voidable against the creditors and not merely that portion of it which reserves the benefit to the transferor himself or withdraws the benefit from the creditors. It was held as a consequence in that case that if the transferee paid off some of the simple debts of the transferor, the transferee could not claim any charge to that extent by reason of the transfer. But some doubts have been expressed about this decision by the Madras High Court recently in *Loorthi Odayar* v. *Gopalasami Iyer* (2) and it may therefore be useful to consider whether the

1. (1906) I L R 30 M 6. 2. (1923) 46 M L J 125.

authority of that case has been shaken to any extent by any subsequent pronouncements on the question.

At the outset, it has to be observed that the decision in *Chidambaram Chettiar v. Sami Iyer* (1) was appealed against to the Privy Council and their Lordships of the Privy Council affirmed the decision of the High Court and said that as regards the actual payment of debts by the transferee, no rights could be based by reason of the transfer, but left open the question if on other grounds any rights could be established by the transferee. This decision cannot be distinguished on the ground that the property dealt with in the case was moveable property and that therefore it cannot be said to be an authority under S. 53 of the Transfer of Property Act. In the first place 13 Ellizabeth Ch. 5 which is reproduced as S. 53 of the Transfer of Property Act as regards immoveable property has been held by the very high authority of Lord Coke and Lord Mansfield to be merely declaratory of the Common Law—*Vide* cases collected in May on Fraudulent and Voluntary Dispositions of Property. (Third Edition) page 3 ; and in this country, we resort to the Common Law for the application of the eruls of justice, equity and good conscience. In the next place, most of the decisions relied on in *Chidambaram Chettiar's case* (1) were given under 13 Eliz. Ch. 5 and S. 53 of the Transfer of Property Act. Besides, that case has been followed as authoritative under S. 53 of the Transfer of Property Act itself.—*Vide* the decisions referred to in the case under notice.

Again, it is difficult to see how the decisions of the Privy Council in *Mushahar Sahu* v. *Lala Hakim Lal* (3) and *Mina-Kumari Bibi* v. *Bijoy Singh Dhudhuria* (4) lay down anything contrary to what was said in *Chidambaram Chettiar* v. *Swami Iyer* (1). In both those cases, the entire amount of consideration for the sale was spent for the discharge of the specific debts of the vendor and there was no reservation of any amount for the benefit of the vendor and no amount was thus withdrawn

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1. (1906) I L R 30 M 6.

3. (1915) I L R 43 C 521 (P C). 4. (1916) I L R 44 C 662 (P C).

from the reach of his creditors. Indeed *Chidambaram Chettiar's case* (1) was referred to with approval by Mukerjee, J., in *Hakim Lal* v. *Mooshahab Sahu* (5) which went up to the Privy Council and was affirmed in *Mushahar Sahu* v. *Lala Hakim Lal* (3). Those decisions lay down only the well settled rule that preferring some only of the creditors would not be fraudulent within the meaning of S. 53 of Transfer of Property Act.

If however out of a portion of the consideration for the fraudulent transfer a pre-existing mortgage by the transferor is paid off, it may be that by such payment, the transferee may be subrogated to the position of the mortgagee who is so paid off, even though his transfer may as such be bad against the creditors of the transferor, on the principle of the case in *Ammani Ammal* v.*Ramaswami Naidu* (6) and the cases referred to thereon. *Cf.* also 2 Pat. 10 at 17. *Palamalai Mudaliar* v. *The South Indian Export Company* (7), *Ummachakutti* v. *Ummerkutti Haji*(8),do not go further than this and are therefore not opposed to *Chidambram Chettiar* v. *Swami Iyer* (1). Where however a fraudulent transferee pays off out of a portion of the consideration, some of the simple debts of the transferor, it is difficult to see how he can stand on a better footing than the creditors whom he has so paid off and how he can have a charge to the extent of those debts. In *Ex parte Chaplin, In re Sinclair* (9), the Court of Appeal held in a similar case that the fraudulent transferee could only prove in insolvency as a simple creditor. There is also a direct decision of the Madras High Court to the effect that the fraudulent transferee is not entitled to a charge. See *Sama Rao* v. *Doraiswami Chettiar* (10). This decision does not seem to have been noticed by the learned Judges in the latest Madras case. That decision dissents from *Rajani Kumar Dass* v. *Gauri Kishore Shaha* (11), a dissent

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1. (1906) I L R 30 M 6.
3. (1915) I L R 43 C 521 (P. C.)
5. (1907) I L R 34 C 999.
6. (1918) 37 M L J 113.
7. (1909) I L R 33 M 334.
8. (1915) 29 I C 583.
9. (1884) 26 Ch. D. 319.
10. (1912) 24 M L J 266.
11. (1908) I L R 35 C 1051.

which seems to have escaped the notice of the learned Judges. We do not believe that any real distinction can be drawn between the case of fraudulent sales and mortgages on this point and we are fortified in this opinion by the fact that the learned Judges in *Loorthi Odayar* v. *Gopalaswami Iyer* (2) have not suggested any such distinction.

UMAN SHANKAR *v.* MUSSAMAT AISHA, I. L. R. 45 All. 729.

In 29 Cal. 664 their Lordships of the Privy Council lay down that when the widow of an undivided member of a Hindu family takes possession of any portion of the joint estate. her possession would be adverse to the members of the family unless it was the result of an arrangement with them. Their Lordships say "He (counsel for appellants) said that it was probable that there was some arrangement between the reversionary heirs and the two widows that they should take a life-interest in these villages in lieu of maintenance. If one were at liberty to guess, one might adopt that view. But their Lordships cannot say that there is any proof of any such arrangement." So that, it is perfectly clear that there is no presumption that her possession in those circumstances is permissive. The case under review is a decision to the same effect. If the property belonged to the husband, no amount of assertion on her part can bar the right of the reversioner. No question of adverse possession arises at all in such a case. Art. 141 is the article applicable and limitation runs from the date of the death of the widow. The question may perhaps stand on a different footing if the widow got into possession during the lifetime of the husband and adversely to the husband himself.

SANTI LAL *v.* RAJ NARAIN, I. L. R. 45 All. 741.

In this case, an application was made under O. 34, R. 6 to make a personal decree against the mortgagor. The Court on the objection of the mortgagor held that the application was statute-barred. The High Court on appeal held otherwise and remanded the case to the lower Court to determine the exact amount due and pass a decree accordingly. The question was whether the order of the High Court was a final order within the meaning of S. 109, C. P. C., the section dealing with appeals to the Privy Council. On the question as to what is a final order, the Courts are much divided. But the question has been the subject of several decisions of the Privy Council and so far as these decisions go, the point must be taken to be settled. In 17 All. 112, the Privy Council held that the order of the High Court disposing of the cardinal issue in the suit, *viz.*, the genuineness of a will on which the plaintiffs relied

was final and an appeal lay to the Privy Council though certain subordinate issues as to mesne profits, etc., remained for consideration. In 15 B. 155 (P. C.) similarly an order holding the defendant liable to account was held to be a final order. In 23 A. 152, an order under S. 244, C.P.C. interpreting a decree as enabling the decree-holder to recover mesne profits for 3 years only from the appellate Court's decree was held to be final. In 49 C 560 (P. C.), an order of the High Court remanding the suit for taking account with a view to see whether certain defendants were liable was held to be final. On the other hand in 47 C 918 P. C. an order reversing a stay of the suit applied for on the ground of an arbitration clause was held not to be a final order. Their Lordships lay down the test to be the final disposal of the rights of parties." "As in the particular case those rights had been left to be determined by the Courts in the ordinary way, their Lordships held that the order was not final. Their Lordships cite two cases—one in (1891) 1. Q. B. 734 which held that an order would be final only if it would dispose of the suit whichever way the decision on the question in issue went and the other in (1903) 1 K. B. 547 which would seem to make final disposal the test without regard as to what would happen if the decision was the otherway. Their Lordships without adverting to the conflict state the law as they do. which has in its support the high authority of Jessel M. R. in 9 Q. B. D 621. Following these various cases, in 16 L. W. 718, the Madras High Court held that an order holding the plaintiff's suit for dissolution of partnership and taking of accounts was not barred by limitation and sending the case back for the passing of a preliminary decree was a final order from which an appeal lay. In that case, the partnership, the members of the partnership and the terms had been found and the only question that remained was the passing of a preliminary decree. In all the cases above referred where the order was held to be final—"the cardinal point" of the suit" (15 B 155) or an issue going to the foundation of the claim (17 All. 112) had been decided, the other questions being questions of a subordinate character or depending on arithmetical calculation. The division of opinion is on the question as to what constitutes such a cardinal point. In 38 M. 509 and 33 All. 391, it was held that an order reversing the dismissal of a suit on the ground of S. 43 C. P. C. (O. 2, R. 2) was not such an order. In 42 All. 574, an order setting aside a dismissal on the ground of *res judicata*

was held not to be a final order. In 25 All. 629, an order remanding a suit for trial on the merits reversing the lower Court's judgment on the ground of limitation was held not to be a final order. In 47 B 106 an order setting aside an order directing a compromise to be filed was not a final order. This view seems to be in accordance with the view of the English Court of appeal in (1906) 2 K. B: 569 where an order setting aside an award was held to be an interlocutory order. On the other hand the Calcutta and the Patna High Courts have held that orders reversing judgments of lower Courts on points of limitation (10 C. L. J. 336) *resjudicata* (25 C. W. N. 896), or setting aside a dismissal for default (21 C. L. J. 279, 6 Pat. L. J. 116) or deciding an issue as to notice which is an essential point in a suit for an annulment of encumbrances, are final orders. Where the reversal is merely on formal or technical points such as addition of parties, (22 C. W. N. 640), or jurisdiction (4 Pat. L. J. 461, 13 C. L. J. 688), even those Courts hold that the Judgment is not final. The decision of the Calcutta and Patna High Courts above referred do not seem to be consistent with the latest decision of the Privy Council in 47 Cal. 918 which makes the final disposal of the rights of the parties the test of finality and not the importance of the issue. The test proposed in (1891) 1 Q. B. 734, *viz.*, that the order either way on the point in question should dispose of the suit if applied, might make all these orders interlocutory. That decision cannot justify the decision that because disposal in one way might put an end to the suit, disposal in any other way also would make the order final. In this view, an order disposing of a question of limitation cannot be a final order but there may be circumstances in which limitation is the only bar to plaintiff getting relief in which case the question of limitation becomes the cardinal question in the suit and a decision reversing the decision on the question of limitation becomes in effect a final decision. Such apparently was the result in the case under review. In that view, the decision seems to be right and consistent with the other decisions of that court and of the Madras High Court.

KELU ACHAN *v.* CHERIYA PARVATHI NETHIAR, I. L. R. 46 M. 631 : 45 M. L. J. 135. F. B.

Section 11 of the Suits Valuation Act provides that no objection by reason of over-valuation or under-valuation should

be upheld by the appellate Court unless it has affected the disposal of the suit on the merits. The point here was as to whether the fact that the venue of the appeal is changed has that effect. Mr. Justice Devadoss was of opinion that it was ; certain Calcutta and Patna decisions support him. On the other hand the earlier Madras decisions support the other view which found favour with Mr. Justice Oldfield and the Full Bench. As interpreted by the Full Bench, there would be but few cases in which the merits could be said to be affected. Possibly the only case, one could think of is where a plea of *res judicata* 'is taken away by reason of the over-valuation. If the case is one of under-valuation, even this illustration fails. Even on the view of Mr. Justice Devadoss when the over-valuation has taken the case to the sub-Court or the under-valuation to the Munsiff's Court but without altering the venue of the appeal the section would apply.

MUHAMMAD KUNHI *v.* PACRICHI UMMA I. L. R. 46 M. 650.:

The question in this case was as to whether in North Malabar usage recognises among Mapillas Stri Sothu or a settlement on females so as to descend on females only to the exclusion altogether of males. There were certain early decisions that seemed to recognise such a kind of property. This system of holding was believed to have its analogue in Canara in what is known as Hennumoola property but on examination, it will be found that the cases from Canara dealing with such property understand by the term only Aliyasantana property— property being derived in that system through females. There is no legal impossibility of such a conception if justified by usage. But apart from usage, it is of course beyond the competence of any individual to lay down a new rule of inheritance for the property settled by him. This case gives the quietus to such a contention in North. Malabar. Unreported decisions have already done the same for Canara also.

JASSU RAM *v.* THE CROWN, 4 Lahore, 246.

Whatever may be the weight ordinarily attached to the opinion of an expert, Courts of Law have generally refused to act on the sole testimony of experts in arriving at conclusions on the cases before them. Though there can be no doubt as to the admissibility of the opinions of experts in matters falling within their expert knowledge and comprised in S. 45 of the Evidence Act, from the point of view of probative value, it has been said that "the testimony which least deserves credit with a jury is that of skilled witnesses." Taylor on Evidence, S. 58; and the dangers to which such evidence is susceptible are pointed out there. The rule that on the sole testimony of an expert, a conviction should not be based has found expression in *In re Venkata Row* (1), in the case of the opinions of handwriting experts. The same view has also been expressed in the case of finger-print experts in *Emperor* v. *Abdul Hamid* (2), *Panchu Mondal* v. *The Emperor* (3), *In re Singri Bhima* (4), *Bazari Hazam* v. *King Emperor* (5) and the case under notice. There is, however, no rule of law as to *quantum* of proof in the Indian Evidence Act and even the rule requiring corroboration in material particulars of the evidence of an accomplice has not been regarded as a rule of law. *King Emperor* v. *Nilakanta* (6), *Muthukumaraswami Pillai* v. *King Emperor* (7). We do not understand the decisions as to the evidence of experts to lay down a rule of law, but only as sounding a note of warning against the possible errors in acting on the sole testimony of an expert and these decisions might well have gone unchallenged. But there are some dicta doubting them in *The Public Prosecutor* v. *Viramma!* (8), by the Madras High Court. In this case the learned Judges themselves did not act on the opinion of the expert and reached a conclusion which was contrary to his opinion. In coming to a conclusion, what other matters the Court will take into consideration along with the opinion of the expert, it will be impossible to define and they will necessarily depend on the circumstances of each case. We may perhaps state here that the other rule laid down in *Bazari Hazam* v. *King Emperor* (5) that the thumb impression of an accused person should not be taken during his trial has been dissented

1. (1905) I. L R 36 M. 159 : 22 M.L J 270.
2. (1905) I. L. R. 32 C. 759.
3. (1905) 1 C L. J 385.
4. (1915) 27 I. C. 900.
5. (1922) I. L. R. 1 Pat. 242.
6. (1912) I. L. R. 35 M. 247.
7. (1912) I. L. R. 35 M. 397
8. (1922) I L. R 16 L. W 663

from by the Madras High Court in 45 M. L. J. (Notes of Recent Cases), p. 18.

CHANDUK *v.* ANANTA LAL : I. L. R. 46 Mad. 948.

The question in this case was as to whether a statement of account by the debtor showing the various debit and credit items with the balance due in response to a demand from the creditor for an account could be used as an acknowledgment of the debt when the statement is not stamped. If the document was one that had to be stamped it could not be used for any purpose. (*See* S. 35 of the Stamp Act). But under article, the acknowledgment has to be stamped only if the acknowledgment is written or signed by or on behalf of, a debtor in order *to supply evidence of such debt.* An acknowledgement merely to save limitation though handed over to the creditor does not require to be stamped. An acknowledgment in a letter etc., not left with the creditor, would not require a stamp. It must be given for supplying evidence of the debt. An acknowledgment merely for the purpose of showing that money has been *advanced* without showing that a debt is due will not come within the article. (*See* 39 Cal. 789). In the case under review, the object of the statement of account was to supply information to the creditor as to how much remained due and not for the purpose of supplying evidence of the debt. The line is somewhat thin but as the learned Chief Justice observes the main point for consideration is as to what is the dominant intention—is it supplying evidence of the debt or is it something else ? If it is the former, the document requires to be stamped. If otherwise, it need not be stamped. The question has to be determined by consideration of the terms of the document along with surrounding circumstances. (21 Bom. 201 F. B.)

THE BRITISH INDIA STEAM NAVIGATION COMPANY *v.* SHARAFALLY. I. L. R. 46 M. 938.

On the construction of the notification accepted by the Court in this case (about the correctness of which we have grave doubts) the question was governed by the ruling of the Full Bench in 5 M. 189. The other Courts have taken a different view on the question and in 5 M. 189, Mr. Justice Innes dissented. It is a paradox to call the Court closed for the vacation and yet say it is open.

The other question in the case was as to whether the High Court could revise an order of the Small Cause Court which rejected an appeal as out of time. Their Lordships say they could. We fail to see how the question of limitation is a question of jurisdiction. The question of limitation cannot stand on a higher footing than the question of *res judicata* and the question of bar by S. 43 C. P. C. which their Lordships of the Privy Council have held to be not questions of jurisdiction in 11 Cal. 7.

The case in 44 M. 454 was of quite another sort. The Court was exercising a limited jurisdiction under O. 21, R. 89 and the question was as to whether the applicant had a *locus standi* to apply or not. S. 11 C. P. C. and O. 2, R. 2 preclude the consideration of the merits of the case quite in the same manner as limitation and yet the Privy Council has held in the case above referred to that they are not questions of jurisdiction.

VIZAGAPATAM SUGAR CO. *v* MUTHURAMA REDDI. I. L. R. 46 Mad. 919 (F. B.)

With this judgment the equitable doctrine of part performance with all its intricacies is re-established for the benefit of the South Indian clients. Recently the wind has been blowing that way for sometime and the result was more or less anticipated. In all these matters, there is a sort of pendulum movement; at one time, there is greater importance attached to form—at another to equity. At one time the expedients by which the Courts in England rode roughshod over the Statute of Frauds were not held up as examples for Courts to follow; on the other hand it was deplored that the Courts took such liberties with the Statute. The tendency at present seems to be just in the contrary direction. It is idle to say that the learned judges that took part in 29 M. 330 did not realise the difference between a contract and a conveyance; they realised it too well and hence their insistence on a sale deed. We think that though giving effect to these equitable doctrines does do justice in individual cases; on the whole, it leads to a frittering away of the salutary effect of the provisions of the Transfer of property Act and the Registration Act designed to secure publicity and to prevent fraud. Their importation into India is very much to be regretted.

The judgment under review does not lay down the limitations on and the implications of, the doctrine of part performance.

Does the doctrine apply only when the remedy of specific performance is still available or does it apply when that remedy is barred ? Is it available against alienees or is it available only against original parties ? If it is available for or against alienees, is the rule subject to the doctrine of notice ? The judgment cannot be said to throw light on any of these points ; on the other hand, it gives rise to a good many queries and doubts. One of them is answered by the judgment of the Division Bench *viz.*, that the doctrine of part performance saves a defendant though his claim for specific performance cannot be enforced by suit by reason of limitation. The defence of part performance and the defence of a contract capable of specific performance seem to be different in their nature, as pointed out by the Full Bench.

CHIDAMBARAM CHETTY *v.* THAIVANAI AMMAL, I L. R. 46 M. 768 (F. B.)

To operate as *res judicata*, there must be a *judicial* order after notice; not necessarily after notice duly served. In this case the order for execution was made without notice; apparently also the order for sale both of which could have been judicial orders if made after notice. The only order after notice was apparently the order settling the terms of the sale proclamation. That order has been held to be only an administrative order by a Full Bench of the Madras High Court. (27 M. 259)

No doubt it has been held by the Privy Council that any objection to the terms of the proclamation should be raised before sale to be available after sale as an objection under O. 21, R. 90 but the implication of these cases is that any order on such objection does not operate as *res judicata*. (*Arunachalam* v. *Arunachalam* (1). When we come to the order confirming the sale, we come again to a judicial order after notice and any failure to raise objections known at the time would bar parties thereto.

The reference was made on account of the decision in 37 M. 462 which held that an order passed exparte against a person binds him unless the order is set aside under O. 9, R. 13. As the Full Bench found that the case could be disposed of without deciding the question their Lordships did not answer the reference.

1. (1888) I. L R 12 M. 19 (P. C.)

RAMASWAMI IYER *v.* VENKATRAMA IYER, I. L. R. 46 M. 815

DAVID BEEVI AMMAL *v.* BALAKRISHNA IYER, 44 M.L.J. 309.

We must confess that these two cases are opposed to the decision of the Full Bench in *Iburamsa Rowther* v. *Thimalai* 34 M. 269 and unless the decision in 10 C. 966 (P. C.) has really decided to the contrary, it seems difficult to support the conclusion. In the last case, suit was brought by the sons to recover property alienated by the father. It is to be noted that the suit was not for partition and in effect what their Lordships say is that the alienee can get the father's share. It is not clear whether it is the father's share in the property given or his share in the entire estate up to the property given. Their Lordships do not decide the point finally as to what share the defendant is entitled and in what property. We do not think that the Full Bench decision in 34 M. 269 can be taken to be overruled by the Privy Council.

RAJAGOPAL NAIDU *v.* RAMA SUBRAMANYA AIYER, I. L. R: 46 M. 782 : 45 M. L. J. 274 (F. B.)

Though the conclusion arrived at in this case viz., that a temple has no market value was only for Court-fee purposes, it may have a wider effect and therefore deserves careful consideration. We do not think that the fact that " the property is inalienable and devoted in perpetuity to religious purposes " is conclusive of the question as to whether the building has any market value or not. For not only the temple but also other properties belonging to the temple are " inalienable and devoted in perpetuity to purposes of charity " and it has never been suggested that they can have no market value. On the other hand, S. 32 of the Land Acquisition Act is enacted for the purpose of securing the proceeds of such property permanently for the benefit of the institution. The two propositions viz., that the temple has not generally a market value and that it cannot have one, are distinct. The judgment of the Privy Council in 16 M. 369 is only an authority for saying that they ordinarily have no value and not for saying that they cannot have any value. Their Lordships expressly say that no attempt was made to show that any price could be got as fancy price for the temple. There may be numerous persons ready to purchase temples if they are put on the market in this country where sectional interests predominate. It would be shocking to be

told that a temple may be demolished for the purposes of a railway without paying compensation. None of the Privy Council cases cited would seem to be an authority for saying that the value of the temple materials at least would not be recoverable if a claim is made on behalf of the institution. In 16 M. 369 the claim was made by the Zamindar on whose land the temple stood. In 25 C. 196 the claim was made by the owner of the land the surface of which was dedicated as public highway. In neither of those cases, the claimant represented the institution or the public. So far as the institution is concerned, it is idle to contend that it is not open in the interests, of the institution to change the place for the abode of the deity or even alienate any part of it. The circumstances of course must be exceptional. Such eventualities can and must be taken into consideration. (1903) 2 K. B. 728. That is the justification for allowing compensation for lands belonging to a temple taken up under the Land Acquisition Act. That would be a justification for giving the value of the materials to the trustees of the institution when the temple is acquired. No doubt so far as the *trustee* is concerned the temple has no market value. But so far as the *trust* is concerned, it has a market value. The value depends upon the person who makes the claim and his rights. *Secretary of State for Foreign Affairs* v. *Charlesworth* (1901) A. C. 373. It is doubtful if the Court Fees Act has consistently carried out this principle. In the case of suits as between landlord and tenant and mortgagors and mortgagees, this principle seems to be partially recognised but in other suits for possession, the principle has not been clearly borne in mind. Arbitrary rules have been made without reference to the value of the interest of the plaintiff. The Full Bench in this case, must be taken to recognise the principle in all cases where *maket value* is made the criterion for Court fees. If a mortgagee sues for possession of a house or garden, the market value from his point of view should be the criterion, that is to say, the market value cannot exceed the value of his mortgage interest in the house or garden. It is to be regretted that having regard to the course the case took it became unnecessary to consider the question whether that principle can be taken to qualify even other cases coming within S. 7 Cl. (V).

SINNAN CHETTY *v.* ALAGIRI AIYAR, I. L. R. 46 M. 852 45 M. L. J. 516.

The receipt of a portion of the amount claimed in an action of trover does not amount to an election to waive the tort. (*Rice* v. *Reed* (1). Nor does a judgment without satisfaction (1920) 2 K. B. 426 for the obvious reason that the suit is one for damages for the wrong and does not involve the giving up of the right to the thing. If the full amount of damages is recovered there might be a transfer by operation of law *Brinsmeed* v. *Harrison* (2). It is difficult to see how title can be conveyed by a mere election on the part of the owner unless in the circumstances an agreement can be inferred between parties to convey the property.

The form of action known as money had to the use of, if adopted, involves no doubt a complete waiver of the tort but was not available in this case except to the extent of the money received by the pledgor. Though therefore the pledgee's title was properly supported, we do not think that there was any justification to reject the claim for damages against the wrong-doer himself. L. R. 5 Ch. 866 is an authority for the position that an election by the owner assented to by the *trustee* in that case might have conveyed the property to the trustee. Mere sending in of the proof was held not to have that effect.

KONTHALATHAMMAL *v.* THANGASAMY, I. L. R. 46 M. 873.

We must confess we have more sympathy with the view that recommended itself to the learned judges in this case as to the power of the Hindu father to appoint guardians to the persons and property of his minor children than that which recommended itself to the Full Bench in 41 M. 561. though there is no conflict between the two cases, the Full Bench having had to do only with the guardianship in respect of joint family property. Even a stranger can appoint a testamentary guardian in effect for property given by him to a minor the testamentary guardian being in fact a trustee. There is no reason therefore why the father should not similarly appoint a guardian in respect of his self-acquisition. But as regards the power to appoint a guardian proper to the person and property of his minor children we do not see anything inherently opposed to the Hindu Law in the

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1. (1900) 1 K B 54. 2. L R 6 C P 584.

recognition of the power. Where the property is joint family property and there is another manager *sui juris*, it would be beyond his power to appoint a guardian in respect of such property so long as the joint status continues. The father could give away the son now no doubt in adoption. He can prohibit the wife from giving away in adoption after his death. Under the law as administered now, the father's religion is to be the religion of the child which doctrine as we know, has evolved out of regard to the presumed intention of the father. A sort of real right in the child was recognised both under the Hindu Law and by the Courts. An action for recovery of the child by the parent was recognised by the Indian Courts. The idea of testamentary guardianship of person and property is a natural development of the idea of Nyasa or gratuitous bailment as adoption is of gift. In fact the usual way in which a child is asked to be taken care of, is by handing over the child and its property to another and asking him to take care of them. As the child comes of age, the bailment determines. This kind of argument is not quite satisfactory but is not without precedent. Jagannatha discussing the rules as to appointment of guardians thus winds up the discussion "This method established by lawyers on their own judgment, is consistent with the reason of the law." 2 Colebrooke's Digest, p. 576. The same rules apply to guardian and bailee (2 Colebrooke's Digest, p. 276) whether the property is handed over by the King or by others ((*ib.*). The rule is preeminently one which the Courts might recognise as a rule of equity and good conscience.

The Madras Law Journal

PART II.] JANUARY. [VOL. XLVI.

NOTES OF RECENT CASES.

Wallace J. }
1923 December, 12. } *Crl. R. C. No. 636 of 1923.*

Criminal Procedure Code, Ss. 252 and 256—Framing of charge without giving accused opportunity to cross examine prosecution witnesses—Procedure irregular—Charge quashed.

The District Magistrate of Madura issued a circular to the effect that in a warrant case the accused need not be permitted to cross examine the prosecution witnesses before a charge was framed and a subordinate Magistrate following this circular refused to permit cross examination of the prosecution witnesses by the accused and framed a charge.

Held, on revision that the circular by the District Magistrate was wholly irregular and that the charge should be quashed.

K. V. Krishnaswami Aiyar for the petitioner.

V. L. Ethiraj for the Public Prosecutor for the Crown.

Krishnan & Waller JJ. }
1923 December 13. } *Crl. Mis R. No. 289 of 1923.*

Criminal Procedure Code, S. 195 (6)—Sanction granted by Sub Magistrate and confirmation by District Magistrate and Sessions Judge—Application to revoke sanction made to High Court before the new Criminal Procedure Code of 1923 came into force Hearing of the application after the coming into force of the new Code—Whether application can be heard.

Where a Sub Magistrate granted sanction on the application of a private party and the same was confirmed by the District Magistrate and the Sessions Judge and a prosecution was launched upon the sanction obtained, and where an application was made to the High Court to revoke the sanction before the coming into force of the new Criminal Procedure

Code of 1923 but came on for hearing after the new Code came into force.

Held, that the new Criminal Procedure Code applied and that under its provisions, the application could be heard.

Cr. M. P. No. 374 of 1923 followed.

Dr. S. Swaminathan and K. R. Rama Aiyar for the Petitioner.

V. L. Ethiraj for the Public Prosecutor for the Crown.

K. V. Krishnaswami Aiyar for the Counter-Petitioner.

Krishnan, J. } *Crl. R. C. No: 70 of 1923.*

Indian Penal Code, S. 363—Kidnapping a minor girl from the lawful guardianship of her husband—Taking should be proved.

To sustain a conviction under S. 363 of the Indian Penal Code there must be proof of taking as required by the section. The fact found *viz.*, the accused being caught with the kidnapped girl by the relations of the husband is not sufficient to support the conviction.

K. S. Jayarama Aiyar and *K. G. Srinivasa Aiyar* for the Petitioner.

Public Prosecutor for the Crown.

Sir Walter Salis Schwabe, C. J., and Waller, J. } *Referred Case No. 7 of 1923.*

Indian Penal Code, S. 395—Dacoity—Temple trustee resigned Resignation accepted to his knowledge-New trustee appointed—New trustee taking paddy from the lessees of the temple—Old trustee taking forcible possession of the paddy on the highway—Charge for dacoity—Jury--Unanimous verdict—Not guilty--Sessions Judge differed—Case referred to the High Court under S. 307 of the Criminal Procedure Code.

Held, that the act of the accused under those circumstances will not amount to dacoity or theft but will give rise to only a civil suit.

44 M. L. J. followed.

Public Prosecutor for Officer.

Dr. Swaminathan & K. G. Srinivasa Aiyar for complainant

Nugent Grant and *V. L. Ethiraj* for accused.

Waller, J. 15*th January*, 1923.	The application was not numbered.

Insolvency—Presidency Towns Insolvency Act, S. 121—*Insolvency Act* (1848) S. 3—*Legal Practitioners Act*, S. 4—*Vakils—Right of audience in insolvancy proceedings.*

Vakils of the High Court have no right of audience before the Court for the relief of insolvent-debtors at Madras. It is only advocates and attorneys that can appear on behalf of suitors in the insolvency side of the High Court.

G. Krishnasami Iyer for the party.

T. R. Venkatrama Sastri for the Vakils' Association.

Nugent Grant for the Bar Association.

(This decision is the subject of Letters Patent Appeal).

Phillips and Venkatasubba Row, JJ. 16*th January*, 1923.	A. S. No. 312 and 329 of 1920.

Jurisdiction—Transfer of territorial Jurisdiction by Government Notification—Effect on pending suits—Mortgage—Preliminary and final decree.

After the passing of the preliminary decree in a mortgage suit the territorial jurisdiction of the Court was transferred by a Government Notification and vested in another Court. Notwithstanding this the Court which passed the preliminary decree had the suit on its file and passed the final decree without any objection from the parties. On appeal it was contended that after the transfer of territorial jurisdiction, the Court which passed the preliminary decree had no jurisdiction to pass the final decree. *Held* that the principle of S. 21 C. P. Code applied to the case, that the objection on the ground of want of territorial jurisdiction must be deemed to have been waived by the parties and that the final decree was validly passed.

Per Phillips, J.: The suit having been validly iustituted in a proper Court, the notification of the Government had not the effect of depriving that Court of jurisdiction over a pending suit.

T. M. Krishnasami Iyer and *K. S. Sankara Sastri* for appellant.

S. Srinivasa Iyengar K. Bhashyam and *K. Narasimha Iyengar* for respondents.

Krishnan, J.
3rd December, 1923
S. A. No. 31 of 1922.

Civil Procedure Code, S. 11—Res judicata—Same parties or parties litigating under the same title—Lease in favour of a person for a term of years—Suit by the lessee in ejectment against the actual cultivating tenants and decree—Delivery of possession in execution—Lease in favour of same person for a subsequent period after expiry of original term—Suit in ejectment against same person—Same defence whether res judicata—Question of jurisdiction whether can be res judicata—Change in law—Effect on a prior decree especially on a question of jurisdiction.

A got a lease for a term of years from the receiver of the Tanjore Palace Estate and during that period brought a suit in ejectment in the Civil Court against the actual cultivating tenants who set up (i) that they were permanent tenants and (ii) that the Tanjore Palace Estate of which the suit lands formed a part was an estate and as such the Civil Courts had no jurisdiction. The first Court over-ruled both the contentions following as regards the 2nd contention the then law that the Tanjore Palace Estate was not an estate which was subsequently changed by a Full Bench Ruling reported in 40 M. 389 and the decree was confirmed in appeal and in execution of the decree A got possession.

Susequently after the expiry of the original term A again got a lease for a fresh term of years and again brought a suit against the same tenant who set up the same contentions that there was a permanent tenancy and that the Civil Court had no jurisdiction.

Held (1) that the defendant was not barred by *res judicata* from setting up the contentions as the parties were not litigating under the same title and as the plaintiff in the present suit does not claim through the plaintiff in the previous suit.

(2) that a question of jurisdiction cannot be *res-judicata* and

(3) that while the law has been altered by a Full Bench Ruling subsequent to the prior decree, the law at the time of the second judgment is to be administered.

S. Varadachari and *R. Rajagopala Iyengar* for appellant.

C. V. Ananthakrishna Iyer and *M. S. Venkatrama Iyer* for respondent.

[FULL BENCH.]

Sir Walter Schwabe, C. J.
Coutts Trotter, Ramesam,
Wallace and Waller, JJ.
17th December, 1923.

C. R. P. No. 796 of 1921.

Civil Procedure Code—O. 21, R. 57—Attachment before Judgment whether applicable—Filing of execution petition whether converts an attachment before judgment into an attachment in execution.

Where a decree-holder who had already got an attachment before judgment of the properties of the judgment-debtor and had also put in an application for execution of his decree, and a subsequent application for sale of the properties was dismissed for his default in not filing the sale papers under O. 21, R. 57, the question arose as between him and a rival decree-holder, whether the attachment before judgment subsists even after the dismissal of the execution petition under O. 21, R. 57. This question was referred to a Full Bench of Five Judges.

Held per (*Coutts Trotter, Ramesam & Waller, JJ. Schwabe, C. J. & Wallace, J. dissenting*) that the attachment before judgment becomes an attachment in execution after the filing of the execution application and consequently the provisions of O. 21, R. 57 will apply and the attachment will cease after the dismissal of the execution petition.

K. V. Krishnaswami Iyer and *K. Balasubrahmania Iyer* for petitioner.

C. V. Ananthakrishna Iyer and *A. Swaminatha Iyer* for respondent.

Krishnan, J.

9th January 1924.

S. A. No. 1163 of 1921.

Madras Estates Land Act, Ss. 5 and 125—Sale for arrears of rent—Mortgage executed by ryot after the Act to discharge mortgage executed before the Act—Effect on mortgage.

A ryot mortgaged his holding after the Madras Estates Land Act came into force in order to discharge a portion of a prior mortgage executed before the Act came into force. The holding was sold for arrears of rent due and the question was whether the purchaser at the rent sale got a title free of any

mortgage under S. 125 of the Madras Estates Land Act. *Held* that the rights under the prior mortgage were kept alive under S. 101 of the Transfer of Property Act and that the rent sale did not affect it. 23 A. 313 followed.

A. Krishnaswami Iyer and *K. Balasubramania Iyer* for appellant.

M. Patanjali Sastri for respondent.

Spencer, Offg. C. J. *9th January* 1924.	S. A. No. 27 of 1923.

Easements Act, S. 13 (a) and (b)—Easement of necessity—Mode of irrigation—Sale of land.

The owner of certain lands sold a part thereof and it was found that at the time of the sale and some time previously, the water required for cultivation of the plot sold was taken through other lands of the vendor. It was also in evidence that the plot sold could be irrigated from another source. The vendee claimed an easement right as against the vendor, to irrigate the plot sold by taking water through the other lands of the vendor. *Held* that the vendee was entitled to the right claimed under S. 13 (*b*) of the Easements Act.

T. Narasimha Iyengar and *R. Gopalaswami Iyengar* for appellant.

K. Rajah Iyer for respondent.

Spencer and |
Kumaraswami Sastri, JJ. } A. S. No. 167 of 1921.
1st January, 1924. |

Limitation Act, Art 106 ·Suit for accounts of partnership—Accounts of prior partnership when taken.

Where a partnership is determined by the death of one of the partners and the brother of the deceased partner as well as the surviving partner continue to carry on the business keeping the same books Art. 106 of the Limitation Act is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement.

25 M. 26 Referred to.

A. Krishnaswami Iyer and *B. Somayya* for appellant.

T. V Venkatarama Iyer and *P. Narayanamurthi* for respondent.

Krishnan, J. |
} S. A. No. 566 of 1922.
1st January 1924. |

Madras Estates Land Act, Ss. 3 (16) and 20—Tank-beds in an estate—Right of land holder to let tank-bed for cultivation.

Where a tank-bed must necessarily be used for the storage of water for cultivating the lands in an estate, the landholder is bound to maintain it as such and could not convert it to any other purpose. Where however the maintenance of a storage tank is unnecessary owing to the introduction of river or canal irrigation, the landholder is entitled to let the tank-bed to ryots for cultivation.

51 I. C. 899 Relied on.

K. Bhashyam Iyengar for appellant,

K. Rajah Iyer and *P. S. Narayanaswami Iyer* for respondent.

Spencer, O. C. J. |
} S. A. No. 1591 of 1922.
11th January, 1924. |

Attachment in execution of money decree—Immoveable property—Prior contract to sell—Sale pending attachment in pursuance of the contract—If prevails over intermediate attachment.

A sale of immoveable property to a third person by a judgment-debtor in pursuance of a contract to sell entered into by him with that person, prevails over an attachment of the property in execution of a money-decree against the debtor, where the attachment is subsequent to the contract.

5 L. W. 234 followed.

C, Rama Rao for the Appellant.

K. N. Rajagopala Sastri for *Y. Suryanarayana* for the Respondent.

Odgers, J. *17th January,* 1924.	*S. A. Nos.* 499 *and* 500 *of* 1921.

Minor-Loan obtained by guardian as such-Hypothecation-Sanction of Court not obtained-Liability of guardian-Misrepresentation-Contract Act S. 235.

The certificated guardian of a minor's estate acting as such, purported to hypothecate the estate and obtained moneys which were utilised on behalf of the minor. Leave of the Court had not been obtained for the mortgage and it was consequently found to be unenforceable against the estate. In a suit by the creditor against the guardian for recovery of the money lent or for damages, *Held* (1) that in the absence of a personal covenant to repay, the guardian was not liable to repay the loan , (2) that as the plaintiff knew that the guardian was acting on behalf of an infant, any representation by the guardian as to his power to bind the minor's estate was one on a point of law, and as such was incapable of supporting a claim for damages. 24 B. 166 , 7 Ch. 777 followed.

A. Krishnaswami Iyer, (K. V. Ramachandra Iyer, with him) for Appellant,

K. Jagannatha Iyer, for respondent.

Odgers, J. *18th January,* 1924.	*S. A. No.* 592 *of* 1921.

Evidence Act Ss. 112 *and* 114-*Legitimacy-Presumption-when arises-Marriage-Proof of.*

Under S. 112 of the Evidence Act the presumption of legitimacy arises only on proof of a marriage, If a marriage in fact is proved then it might be presumed to be valid: 6 A. C. 364. 371 referred to. The presumption of a marriage from repute arises only where the evidence shows that the parties were living together for a sufficiently long period and were treated as husband and wife by their relations and the public, 35 C. 232 P. C. referred to. Where a man had already married a woman and had children by her, there is no presumption that another lady with whom he is said to have lived is his wife or his children by her are legitimate.

K. V. Sesha Iyengar, for appellant.

A. V. Visvanatha Sastri' for respondent.

Odgers and Wallace, JJ.
18th January, 1924. } C. *M. A.* 376 *of* 1922.

Probate and Administration Act. S. 50-*Revocation—Dismissal of first application—Subsequent application on same grounds—Res judicata—Knowledge of probate proceedings without intervention—Effect of.*

Letters of administration with will annexed were granted to the widow of the testator, the adoptive mother of the fourth respondent. In 1910 the appellant, an undivided brother of the testator, applied for revocation of the grant on several grounds. His application was dismissed on the ground that he was aware of the proceedings and had not intervened. In 1916 on an application by some other brothers of the testator, the grant was recalled by the High Court. Thereupon the application was registered as a regular suit between those brothers and the widow and finally letters of administration were ordered to be re-issued to the widow. In 1921 the appellant filed an application for revocation. *Held* that the application was barred by the previous proceedings of 1910 which went on the same grounds, as well as by the judgment in the contentious proceedings.

Per Wallace, J. Even apart from S. 11 of the C. P. Code, the principle of *res judicata* ought to be applied to Proceedings under the Probate and Administration Act. 48 C. 499 P. C. followed.

Per Odgers, J. The judgement in the contentious suit was a judgment *in rem* and was binding upon the appellant though he was not a party to it. Any party aware of a probate proceeding and standing by, is bound by the result thereof. 18 C. 45 followed.

Per Wallace, J. The subsequent recall and regrant of letters has not the effect of removing the legal consequences of the original grant as regards persons who had been before that date defeated in their attempt to vacate it.

C. S. Venkatachari & A. Venkatachalam for appellant.

P. Somasundaram for respondent.

Wallace J.
21st January, 1924. } *S. A. Nos.* 864 *and* 865 *of* 1921.

11. *Trust-Several trustees-Delegation of duties by some of the trustees-Legality of.*

Where six out seven trustees of a Malabar Temple executed a deed called a power of attorney in favour of a stranger by which the latter was given full discretion in the matter of management of devaswom properties, granting of leases and renewals, effecting of repairs, collection and expenditure of the income of the temple and institution of suits for a period of 12 years and it was also provided that the power was to be irrevocable during the said period. *Held*, in a suit by the seventh trustee who was not a party to the deed that the power of attorney was virtually a delegation of all the rights of the trustees to a stranger, that the dissenting trustee's right to be cousulted in important matters of management was ignored if not taken away by the document and that the deed was not binding on the trust.

C. V. Ananthakrishna Iyer, for appellant.

Advocate General and *K. Krishna Menon,* for respondent.

Ramesam, J.
16th January, 1924. } C. R. P. No. 643 *of* 1921.

Civil Procedure Code, S. 20—*Contract—Jurisdiction—Cause of action—Place where offer is received and money is payable under contract—Place where part of the cause of action arises.*

Plaintiff was a merchant at P. and defendant a commission agent at M. The defendant from M. wrote to the plaintiff at P. offering to sell his (plaintiff's) goods and send the proceeds of sale less commission to the plaintiff at P. The plaintiff sent goods but defendant failed to sell them. In a suit by plaintiff against defendant instituted at P. for recovery of the price, the latter took objection, that the contract was completed at M, that offer and acceptance had taken place there, that performance under the contract was also due there, and that in consequence the cause of action arose only at M. and that the court at P. had no jurisdiction to entertain the suit as no part of the cause of action arose within its jurisdiction.

Held :—1. That performance was due under the contract at P. as the price of goods was payable at P and that the place of payment is a place where part of the cause of action arises.

2. That the place where the offer was received was P and that part of the cause of action arose at P. offer being a part of the cause of action and therefore the court at P. had jurisdiction.

B. Somayya and *E. Krishnamurthi*, for petitioner.

K. Rajah Aiyar and *V. Ramasami Aiyer*, for Respondent.

C. A. S.

Odgers and Wallace, JJ.
21st January 1924. } C. M. P. No. 174 of 1924.

Receiver—Appointment of a Receiver on an application for stay of execution pending appeal to Privy Council-Dismissal of the appeal by the Privy Council-Authority of the High Court to give directions to the Receiver, whether ceases on the disposal of the appeal by the Privy Council.

Pending an appeal to the Privy Council on an application for stay of execution in a suit for the settlement of a scheme for a temple under S. 92 of the Civil Procedure, Code the High Court appointed the defendant trustee himself as a Receiver. After the disposal of the Privy Council appeal and before the records were transmitted by the High Court to the lower Court, the High Court has power in such a case to issue directions to the Receiver to associate with himself another independent person to supervise the collections during a festival.

The Receivership did not come to an end on the disposal of the appeal by the Privy Council which in the case was a dismissal of the appeal by the defendant.

28 Cal. 790 approved.

T. R. Ramachandra Aiyor, K. Rajah Aiyar and *Salem Ramaswami Aiyar* for the petitioner.

K. S. Jayarama Aiyar for the respondents.

C. A. S.

Odgers and Wallace, JJ.
22nd January,
1924.

S. A. No. 334 *of* 1921.

Poramboke-Water channel passing through a survey field—Patta issued in respect of the survey field—Rights of pattadar—watercess—Liability to pay.

A water channel passing through a survey field was not separately demarcated and specified as Government Poramboke but a patta was issued to a person in respect of the whole survey field. *Held*, that this was not a sufficient ground for holding that the pattadar was the owner of the channel. Where a channel starting from a Government poramboke passed through a survey field for which the plaintiff *held* patta and emptied itself further down in a Government tank and the plaintiff used the said channel water for raising wet crops on his dry land, *held*, that the Government was entitled to levy watercess. 31 I. C. 982 distinguished.

The Government Pleader, for appellant.

T. R. Vijayaraghavachariar, for respondent.

A. V. V.

Venkatasubba, Rao, J.
22nd January,
1924. } S. *A. No.* 780 *of* 1921.

Aliyasantana Law—Junior member—Past maintenance—Right to—Demand and refusal—Waiver.

A suit by the junior member of an Aliyasantana family for arrears of past maintenance on the ground that the plaintiff had been living away from the tarwad with her husband was dismissed by the Court below on the ground that there had been no demand and refusal prior to suit. *Held*, that there need not have been a prior demand and refusal to sustain a claim for past maintenance but an express or implied waiver was a bar to the claim. 36 M. 203; 36 M. 593; 35 M. L. J. 665 relied on.

B. Sitarama Rao, for appellant.

K. Y. Adiga, for respondent.

A. V. V.

Venkatasubba Rao J.
23rd January 1924. } *S. A. No.* 371 *of* 1921.

Minor—Sale in favour of—Legality.

A sale in favour of a minor is valid and the covenants under S. 55 of the Transfer of Property Act being statutory and not contractual, the parties are bound thereby. 40 M. 308 followed.

P. R. Ganapathi Iyer with *Gopalakrishna Iyer*, for appellant.

N. S. Rangaswami Iyengar, for respondent.

A. V. V.

Phillips and Odgers, JJ.
24th January, 1924. } *C. M. A. No.* 69 *of* 1923.

C. P. Code, O. 1, *R.* 10 *and O.* 22, *R.* 10*—Mortgage suit—Preliminary decree—Addition of parties—Purchaser of mortgaged property.*

It is competent to the Court acting under O. 1, R. 10 of the C. P. Code to add an auction purchaser of mortgaged property as a party to a suit on the mortgage even after the passing of a preliminary decree therein provided the party so added is given an opportunity to state his defence and to question the correctness of the preliminary decree.

16 L. W. 905 distinguished.

25 Ch. D. 7`0 referred to.

K. V. Krishnaswami Ayer and *K. Narasimha Iyengar,* for appellants.

P. R. Ganapathi Iyer and *S. Panchapagesa Iyer,* for respondents.

A. V. V.

Krishnan, J.
25th January, 1924. } *Cr. Ap. No.* 1033 *of* 1923.

Criminal Trial—Prosecution story disbelieved—Reconstruction of facts by trial Judge and conviction thereon—Such procedure unallowable.

Where two persons were charged with offences under S. 304 and 334 Indian Penal Code, and the Sessions Judge disbelieved both the prosecution and defence versions, but sought to reconstruct what should have been the facts and convicted the accused thereon.

Held, that such a procedure was not justifiable at all ; the evidence should be considered by the learned Judge and he must come to some conclusion on the evidence in the case and not what he supposes would be likely to have been the facts of the case. Such reconstruction was quite unallowable. On the finding that the prosecution case was disproved the accused should have been given the benefit of the doubt and set at liberty.

B. Somayya and *E. Krishnamurthi,* for appellants.

The Public Prosecutor, for the Crown.

C. A. S.

Ramesam and Jackson JJ.
25th January, 1924. } *A. S. No.* 218 *of* 1921.

Minor—Guardian—Appointment of agent—Liability of agent—Right to sue.

Their Lordships referred to a Full Bench the question whether when the guardian of a minor appoints an agent to manage the minor's properties a suit against the agent for accounts etc. should be instituted by the guardian without reference to the minor or by the minor himself.

B. Sitarama Row for *T. V. Gopalasami Mudaliar,* for appellant.

S. Varadachariar, for respondent.

A. V. V.

Waller, J.
25th January, 1924. } *S. A. No.* 463, 464 *to* 467 *and* 1423 *of* 1922.

Madras Estates Land Act S. 112—*Right to sue under—" Defaulter " who is—Transferee from registered pattadar.*

The expression ' defaulter ' denotes only the person who is the registered pattadar or the heir of the registered pattadar or the person whom the landholder is bound to recognise as pattadar by reason of the provisions of S. 146 of the Madras Estates Land Act. It is only the ' defaulter ' that can sue under S. 112 of the Act and not any other person even though he has an interest in the holding ; and a transferee from a registered pattadar cannot sue to set aside an attachment for arrears of rent under S. 112 of the Act.

40 M. L. J. 213 followed.

T. R. Venkatarama Sastri and *C. Rama Row Saheb*, for appellant.

S. Ramaswami Iyer, for respondent.

A. V. V.

Odgers and Wallace, JJ.
29th January, 1924. } *C. M. A. No.* 377 *of* 1923.

Jurisdiction—Transfer of territorial jurisdiction by Government Notification—Effect on pending proceedings.

Where after the close of the hearing of an application for the appointment of a Receiver pending a suit the territorial jurisdiction of the court was taken away by a Government Notification and vested in another Court, the court which heard the application is not deprived of jurisdiction over pending proceedings and its judgment pronounced after the Notification is valid.

43 M. 675 ; A. S. No. 312 and 329 of 1920 followed.

K. S. Sankara Iyer for *T. R. Venkatarama Sastri*, for appellant.

S. R. Dixshit for *T. R. Ramachandra Iyer*, for respondent.

A. V. V.

Odgers and Wallace, JJ.
29th January, 1924. } *C. R. P. No.* 767 *of* 1922.

Civil Procedure Code, S. 115—*Election to Taluq Board—Madras Act XIV of* 1920 *and rules framed under—Misinterpretation of—Election inquiry Court—Revision.*

Their Lordships referred to a Full Bench the following question :—"Whether an erroneous order by an Election Enquiry court based on a misinterpretation of the provisions of Madras Act XIV of 1920 and the rules framed thereunder, is a legal ground for interference with the order of that court by the High Court under S. 115 of the C. P. Code."

44 M. L. J. 1 ; 44 M. L. J. 161 Referred to.

P. Narayanamurthi and *K. Ramamurthi,* for petitioner.

C. Rama Rao for respondent.

A. V. V.

Phillips and Odgers, JJ.
29th January, 1924. } *L. P. A. No.* 2 *of* 1923.

Appeal in forma pauperis—Power of Court to order security for costs—Power can only be exercised on exceptional grounds.

A Court of appeal has got the power to order security for the costs of the respondent even in an appeal preferred *in forma pauperis,* but it should not pass such an order except on very special grounds.

3 Mad. 66 followed.

Where a Hindu wife brought a suit as a pauper against her husband for separate maintenance on the ground of cruelty and desertion, and on her suit being dismissed by the trial Court on the ground that habitual cruelty has not been established, got leave from a judge of the High Court to appeal *in forma pauperis* and subsequently on the application of the respondent another judge ordered the appellant to furnish security for the respondent's costs of the appeal, against which a Letters Patent appeal was preferred, *held,* that the order directing security amounted to a review of the order giving leave to appeal as a pauper and no special grounds having been shown, the order for security must be set aside.

Watrap S. Subramania Aiyar for the appellant.

K. Ramanatha Shenai for the respondent.

C. A. S.

Krishnan and Waller, JJ.
29th January, 1924.
Crl. A. Nos. 981 *and* 982 *of* 1923.

Confession—Retracted confession—Conviction whether can be based on retracted confession.

A conviction should not be based on the retracted confessions of the accused unless corroborated *aliunde*.

1923 M. W. N. 697 followed.

Dr. S. Swaminathan and Watrap S. Subramania Aiyar for the appellant.

The Public Prosecutor for the Crown.

C. A. S.

Wallace, J.
31*st January,* 1924.
S. A. No. 834 *of* 1921.

Evidence Act, S. 116*—Landlord and tenant—Entry by tenant into Government land under landlord-Government subsequently asserting paramount title to the land--Threat by eviction by Government under the paramount title as against tenant—Execution of muchilika by tenant to Government under Madras Land Encroachment Act,* 1905*—Subsequent suit in ejectment by landlord against tenant—Whether tenant entitled to plead the title of Government —Estoppel.*

The ancestors of the defendants got into possession of a piece of land under the plaintiff's predecessor-in-title on condition of rendering Purakkudi service to the plaintiff's ancestors and the plaintiff. The defendants' ancestors built a house on the plot of land and were living in it. The land was all along Government poramboke land and the Government issued notice to the defendants under S. 7 of the Madras Encroachment Act calling upon them to pay penal assessment for occupying that portion of Government land on which they built a house. The defendants also subsequently executed a muchilika to Government agreeing to pay penal assessment and agreeing to vacate the land when required by the Government. In a suit by the plaintiff to eject the defendants subsequent to the execution of the muchilika *held*, that the plaintiff was not entitled to recover the land.

By reason of the threat of eviction by the crown who was the paramount title holder and by the defendants' execution

of the muchilika and the payment of the penal assessment to Government, there was an eviction of the defendants by the paramount title holder *i.e.*, the Crown, and the defendants' tenure under the plaintiff became determined. The defendants are not estopped from contending that the plaintiff's title was defeated by the Government asserting its paramount title and by the constructive eviction of the defendants.

2 Mad. 226 and 35 C. L. J. 146 followed.

43 I. C. 677 and 45 I. C. 656 distinguished.

C. *A. Seshagiri Sastri* for the appellants.

S. *Muthia Mudaliar* for the respondents.

C. A. S.

Ramesam and Jackson, JJ.
31*st January*, 1924.
A. S. No. 116 *of* 1921.

Limitation Act, Art. 132—*Mortgage—Interest payable in instalments—Whole payable on demand in case of default—Suit more than* 12 *years after first default—If barred.*

A mortgage deed provided that the amount due was payable at the end of one year, but interest was to be paid once in 3 months. It further provided that on default of any such payment, the whole of the principle and interest would become payable on demand. In a suit filed on the mortgage more than 12 years from the date of first default. *Held,* the period of limitation did not begin to run from the date of default.

C. *V. Anantakrishna Aiyar* and *V. Narayana Aiyar* for appellant.

T. M. Krishnaswami Aiyar and *T. A. Ananta Aiyar* for respondent.

T. S. V.

Wallace, J.
31*st January*, 1924.
S. A. No. 1752 *of* 1922.

Inam—Karnam's Inam—Enfranchisement—Resumption and regrant—Effect of issue of title deed—Rights of grantees—Madras Acts IV of 1862, *IV of* 1866 *and VIII of* 1869—*Adverse Possession.*

The enfranchisement of a karnam's inam operates as a resumption and regrant in favour of the grantees named in the inam title-deed The case of service inams is different from

that of personal inams: 44 M. 643 P. C., relied on. S. A. 287 of 1921 followed.

Madras Act VIII of 1869 was purely retrospective and was intended to save occupancy rights in lands wherefrom inams might be derived. 30 M. L. T. 334 not followed. Until enfranchisement there cannot be any question of adverse possession of service inam lands and the case in 44 M. 643 P. C., has impliedly overruled the cases in 14 M. L. J. 438 and 38 M. L. J. 320.

Y. Suryanarayana for appellants.

K. N. Rajagopala Sastri for *B. Satyanarayana* for respondents.

A. V. V.

Ramesam and Jackson, JJ.
1st February, 1924. } *S. A. Nos.* 185 *to* 195 *of* 1922.

Landlord and tenant—Rent fixed on crop basis—Improvements at the expense of tenants—Variation of crop—New crop raised—Liability of tenant.

In a zemindary in Madura, rent was admittedly fixed on the basis of crops, there being a lower rate for pulses and a higher one for cereals. The tenants at their own expense made improvements and as a result of the same raised new garden crops. *Held* the landlord was only entitled to the amount he would get if the best variety of cereals is grown.

A. S. Venku Aiyar, Waltap S. Subramania Aiyar and *A. S. Srinivasa Aiyar* for appellant.

F. S. Vaz for respondents.

T. S. V.

Wallace, J.
1st February, 1924. } *Cr. R. C. No.* 292 *of* 1923.

Stay of Criminal Proceedings pending Civil Suit—Power of Bench Court to stay—Prosecution for criminal trespass before Bench court—Stay pending civil suit regarding title and possession.

A Bench Court trying a case of criminal trespass has got the power to stay the same pending the disposal of a civil suit in which the question of title and possession to the same property is pending adjudication between the same parties in a civil suit.

In such a case if the defence is that the accused was already in possession and did not take possession on the date of occurrence, the civil case will not have a bearing on the defence in the criminal case, and the latter need not be stayed pending the civil case. If on the other hand the defence is that the accused took possession because he was entitled to take possession, then the civil case will have a bearing on the criminal case and the latter might be stayed pending the disposal of the civil case.

Watrap S. Subramania Aiyar for the petitioner.

V. L, Ethiraj for Public Prosecutor for the Crown.

C. A. S.

Phillips and Odgers, JJ.
1st February, 1924. } *C. M. A. No.* 289 *of* 1923.

Civil Procedure Code, O. 39 *Rr.* 1 *and* 2—*Temporary injunction—Purchase of the equity of redemption by Mortgagee pending attachment of Mortgagor's interest—Claim petition by mortgagee purchaser dismissed—Suit to set aside claim order—Temporary injunction pending suit.*

A mortgagee of certain properties subsequently purchased the same but after its attachment in execution of a decree against the mortgagor, the mortgagee preferred a claim petition in the execution proceedings but it was dismissed. Afterwards he filed a suit for a declaration that the property could not be attached and sold in execution of the decree and for an injunction restraining the sale thereof. *Held* that the mortgagee plaintiff is entitled to an injunction pending disposal of the suit. 16 Bom. L. R. 676 not foll.

K. Rajah Iyer and *S. Nataraja Nadar* for appellant.

K. V. Srinivasa Aiyar for respondent.

C. A. S.

Ramesam and Jackson, JJ.
4th February, 1924. } *A. S. No.* 121 *of* 1921.

Hindu Law—Partition—Suit for—Alienee from father—Equities in favour of—Joinder of parties.

In a suit by a son for partition of joint family properties including those sold away by his father, it is open to the

alienees to claim that the properties in their hands should be allotted as and for the share of the father and that the plaintiff should get his share from out of the family properties in the hands of persons who have taken as donees or volunteers from the father and that the latter should be added as parties to the suit.

46 M. 815
40 C. 966 } followed.
44 M. L. J. 309

C.S. Venkatachari and A.V. Visvanatha Sastri for appellants.
T. L. Venkatarama Iyer for respondents.
A. V. V.

Phillips and Odgers, JJ.
5th, February 1924. } *C. R. P. No* 1073 *of* 1923.

Madras District Municipalities Act—Rules framed under Rule 17—Ballot paper—Identification of voter—District Judge opening the ballot box and counting the ballot papers—Legality of election.

The respondent objected to the election of the petitioner as a member of a Municipal Council on the ground that about 85 ballot papers which had been invalidated by the Chairman for the reason that they were initialled in the front by the polling officer, ought not to have been so invalidated but should have been counted. The District Judge opened the ballot box and on counting the ballot papers the respondent was found to have got more votes and he was therefore declared elected. On revision it was contended by the petitioner that the initialling of the ballot papers by the polling officer in the front would lead to the identification of the voter under rule 17 of the Election rules and that the Secrecy of the election was thus infringed. *Held* overruling the objection, that the respondent was duly elected and that the action of the District Judge in counting the disputed votes was proper.

T. R. Ramachandra Iyer and S. R. Dikshit for petitioner.
K. Rajah Iyer and V. Ramaswami Iyer for the respondent.

Phillips and Odgers, JJ.
5th, February 1924. } *C. R. P. No.* 1072 *of* 1923.

Madras District Municipalities Act V of 1920, *S.* 9—*Madras Municipal Election Rules* 1920, *Rule* 17 (1)—*Ballot papers marked*

on backs by polling officer with electoral roll numbers—Whether valid—Election of returned candidate set aside on objection petition —Returned candidate himself the retiring councillor—Whether can be desired to have been re-elected, if willing to serve.

In a Municipal election, the polling officer marked on the back of every ballot paper the electoral roll number of the voter to whom it was issued. Though as a matter of fact nobody was aware of it then and there was no evidence that any voter was thereby identified the defeated candidate questioned the election on the ground that as the electoral roll numbers had been given on the back of all the ballot papers, identification was possible. The returned candidate contended that the election should not be avoided because no identification had as a matter of fact taken place and further neither the voters nor the candidates should suffer for a mistake of the polling officer which was not done with their connivance and which had not materially affected the result of the election. He also further contended that even if the votes were invalid on account of the electoral numbers appearing on the backs of the ballot papers, he as the retiring councillor willing to serve should be deemed, to have been re-elected under S. 9 of the District Municipalities Act, 1920.

Held, (*i*) that the votes were invalid as the electoral numbers on the backs of the ballot papers may lead to identification.

L. R. 10 C. P. 733 followed.

Madras Municipal Election Rules, R. 17 (1) referred to.

(*ii*) that S. 9 of the District Municipalities Act 1920, applies only to cases where no councillor is elected at an election held and not to a case where a councillor is elected and his election is set aside as the result of an objection petition.

I. L. R. 34 B, 659 distinguished.

Madras Municipal Election Inquiry Rules, R. 12 referred to.

S. Muthiah Mudaliar, K. S. Ganapati Aiyer and *Watrap S. Subramania Aiyer,* for the petitioner.

K. V. Krishnaswami Aiyer and *N. Swaminatha Aiyer,* for the respondents.

C. A. S.

Wallace, J.
5th February, 1924.

S. A. No. 398 of 1921.

Mortgage—Prior and subsequent—Sale in execution—Second mortgage prior to confirmation—Sale set aside on deposit by puisne mortgagee—Failure of mortgagor's title—Rights of parties—Subrogation—How worked out—Limitation.

In execution of a mortgage decree certain properties were sold but before confirmation of sale, the mortgagor executed a second mortgage and under the terms thereof the mortgagee deposited the amount due and got the sale set aside. In a subsequent litigation it was found the mortgagor had no title to the property, whereupon the second mortgagee sued to recover the amount he had deposited to set aside the execution sale as a charge on the suit property.

Held (1) he was subrogated to all the rights of the first mortgagee purchaser as on the date of deposit and that what he acquired by subrogation was not merely the rights of the first mortgagee ;

(2) his subrogation rights could not be worked out in execution, but the remedy was by suit ; and

(3) the cause of action for such a suit arose only on the date of deposit and not on the date of the first mortgage. 25 C. W. N. 283 ; 3 Pat. L. T. 533 not approved ; 39 Cal 523 distinguished ; 43 All. 469 refd. to.

T. R. Venkatarama Sastry and *S. Venkatrama Aiyar* for appellant.

S. Muthia Mudaliar and *N. Swaminatha Aiyar* for respondents.

T. S. V.

Ramesam and Jackson, JJ
6th February, 1924.

A. S. No. 160 of 1921.

Deed—Construction—Mortgage executed by a person without reference to a minor for whom he is alleged to have acted as guardian—Suit against guardian personally—Decree—Subsequent suit to enforce mortgage by sale of the hypotheca against minor—Election of remedies—Estoppel.

A widow in possession of her husband's estate mortgaged the property without describing herself as guardian of a minor

boy who was alleged to have been adopted to her husband. In fact there was no reference to the minor in the document. Part of the consideration for the mortgage was for the payment of debts contracted by the lady herself. It was also found that at the time of the mortgage the widow was hostile to the alleged adopted son and asserting her right to the properties. The mortgagee sued on the mortgage and obtained a decree against the widow. Subsequently the mortgagee brought a suit against the minor to enforce the mortgage by sale of the hypotheca. It was contended on behalf of the defendant that the mortgage was executed by the widow personally without reference to her character as guardian; and even if the mortgage might be referable to her character as guardian, the plaintiff having elected to sue the widow personally and obtained a decree against her could not afterwards sue on the footing that the mortgage was executed on behalf of the minor. *Held* that the mortgage could not be construed as having been executed on behalf of the minor and was therefore not enforceable against him. If however the document was executed by the widow as guardian was referable to her character as such, a judgment obtained against would not bar a suit against the minor for enforcement of the mortgage by sale of the hypotheca, either on the principle of estoppel or of election of remedies. *Kendal* v. *Hamilton* 4 A. C. 504; *Scarf* v. *Jardine* 7 A. C. 345 distinguished.

15 A. 304 (P. C.) referred to.

C. Krishnaswami Rao and *K. S. Jayarama Iyer* for appellant.

A. Krishnaswami Iyer and *V. Sundaram Iyer* for respondent.

A. V. V.

Phillips and Venkatasubba Rao JJ.
6th February, 1924. — A. S. No. 101 of 1921.

Civil Procedure Code O. 32, R. 4—Minor defendant—Guardian ad-litem-consent of guardian to his appointment—If must be express—Decree against minor without such consent—Validity of.

Their Lordships referred to a Full Bench the question (1) whether the consent of the guardian referred to in O. 32, R. 4 (3), C. P. Code, should be express or may be implied from conduct of the person appointed guardian and (2) where a decree passed against a minor for whom a guardian has been appointed

without his consent is void or merely voidable on proof of prejudice to the minor

P. Narayanamurti and *K. Ramamurti* for appellant.

T. Ramachandra Rao for respondent.

A. V. V.

Wallace, J. *6th February*, 1924.	S. A. No. 843 of 1924.

Guardian—Appointment by court—Failure to give notice to nearest relative—Effect on decree.

In a suit to set aside a decree passed against a minor on the ground he was not properly represented in the suit, it was found that the maternal uncle of the minor refused to accept guardianship whereupon the court appointed a stranger as guardian but no notice of the same was sent to the maternal uncle with whom the minor was living

Held the failure to serve notice of the appointment on the maternal uncle amounted, if at all, only to an irregularity and this did not in any way affect the decree

K. N. Rajagopal Sastry for *B. Satyanarayana* for appellant.

N. Rama Rao for respondent.

T. S. V.

Wallace, J. *7th February*, 1924.	S. A. No. 228 of 1921.

Malabar Law—Moplah governed by Marumakkattayam law-Gift to daughter—Tarwad incidents.

Where a Moplah governed by the Marumakkattayam law made a gift of property to his daughter *simpliciter* but there was a clause towards the end of the document that the donee and her " Santanam " were to enjoy the property *held* that the donee did not take the property absolutely but as tavazhi property. 16 M. 201; 35 M. 648; 39 M. 317 relied on.

T. R. Ramachandra Iyer and *S. Srinivasa Iyer* for appellant.

C. V. Anathakrishna Iyer and *B. Pocker* for respondent.

A. V. V.

Spencer, O. C. J. and Devadoss, J.
7th February, 1924. } Ref. Case No. 1 of 1923.

Madras City Municipal Act, Sch. IV R. 7 Proviso—" Gross income received in and from the city"—Meaning of—Receipts from agents abroad—Assessment of Company tax—Gross income—How calculated.

Moneys remitted to and received in Madras by a Company from its agents outside the city do not fall within the expression ' gross income received in and from the city " in the proviso to Rule 7 of Schedule IV of the Madras Municipal Act and as such cannot be taken into consideration for the purpose of buying the Companies' Tax. The "gross income" from the sale of a particular article is the difference between the sale price and the cost price at the place of sale.

R. N. Aingar and *O. T. Govindan Nambiar* instructed by *Messrs. King* and *Partridge* for the assessee.

P. Doraiswamy Aiyangar for the Corporation.

T. S. V.

Ramesam and Jackson, JJ.
11th February 1924 } A. S. No. 175 of 1921.

Hindu Law—Joint Family—Partition—Liability of sons after partition—Considerations guiding.

Where the father in a joint Hindu family incurs a personal debt and before the same is paid off he and his sons enter into a partition, the latter are still liable for their father's debts to the extent of family property in their hands provided they are not incurred for an illegal or immoral purpose. 41 Mad. 136 and 40 M. L. J. 473 dissented from.

T. M. Krishnaswami Aiyar and *N. Rama Rao* for appellants.

S. Varadachari, T. S. Raghunatha Rao and *V. Viyyanna* for respondents.

T. S. V.

Devadoss, J.
29th January 1924. } C. S. No. 545 of 1922.

Money decree—Extension of time for payment. C. P. C, O. 20, R. 11.

Where a money decree was passed and 3 months time granted for payment of the decree amount, and subsequently the judgment-debtor applied for further time and stay of execution, *held* that under Order 20, Rule 11, the Court had no power to pass such an order without the consent of the decree-holder.

O. S. A. 16 of 1923 followed.

T. D. Srinivasachari and *T. Chakravarti Iyengar* for the Applicant.

V. V. Srinivasa Ayyangar and *A. Narasimhachari* for the Respondent.

Phillips and Odgers, JJ.
4th February 1924. } C. M. P. No. 992 of 1923.

Civil Procedure. Code O. 45, R. 7 (1) (a)—Amount paid into court towards the costs of the Privy Council appeal—Privy Council appeal dismissed with costs—Whether the appellant or any other person can contend that the amount deposited was not payable towards the cost of the respondents—Objection that the amount did not belong to the appellant, whether entertainable.

Where pending an appeal to the Privy Council the appellant paid into the High Court a sum of money towards the costs of the respondents in the Privy Council appeal and the appeal was subsequently dismissed by the Privy Council with costs, it is not open to the appellant or any other person to say that the amount did not belong to the appellant and that the amount is not therefore available to the respondents for the costs of the Privy Council appeal.

Where a suit was brought for a declaration that the defendant was not a lawfully appointed matadhipathi of a Mutt and the High Court declared that the defendant was not the lawfully appointed head of the Mutt and the defendant appealed to the Privy Council and deposited with the Registrar of the High Court a sum of Rs. 4,000 in the shape of Government promissory notes towards the costs of the respondents in the Privy

Council appeal, it is not open to a subsequent lawfully appointed matadhipathi to object to the payment out of the amount to the successful respondents to the Privy Council appeal on the ground that the amount belonged to the Mutt and could not have been given as security for the costs of the other side.

Such an enquiry as to the ownership of the amount cannot be entertained by the Court.

32 M. L. J. 503, 41 M. 1154 applied.

C. A. Seshagiri Sastri, for the Petitioner.

T. V. Gopalaswami Mudaliar, for the Respondent.

C. A. S.

Krishnan and Waller, JJ.
6th February, 1924. } Crl. Ap. No. 1034 of 1923.

Criminal Procedure Code, S. 239—Two persons accused under S. 411, *Indian Penal Code—Joint trial—Joinder of charges whether valid—Criminal trial—Jury, omission to direct jury on question whether property stolen—Essentials of offence under S.* 411—*Indian Penal Code, S.* 411.

Two persons were accused of offences under Sec. 411, Indian Penal Code, and were jointly tried. On objection being taken that such joint trial was not valid, a charge under Sec. 395, Indian Penal Code, was added by the Sessions Judge at the close of the trial with a view to get over the technical objection.

The jury among other misdirections were directed to satisfy themselves whether the property in question, *viz.*, five currency notes of Rs. 100 denomination, was really stolen property identifiable as such; and the first accused was convicted by the jury.

On objection being taken in appeal that (1) such a joint trial was invalid inasmuch as the offences in the case of each of the accused were distinct and separate and formed independent transactions.

(2) that joinder of a charge under Sec. 395 at the last stage to avoid a technical objection was not justifiable and that it had seriously prejudiced the first accused in his trial and

(3) that there were material misdirections and omissions in the charge to the jury which vitiated the conviction.

Held, (1) that S. 239 of the new Code expressly enables the Court to charge and try together two or more persons accused of offences under S 411 in reference to stolen property transferred by one offence and that it is sufficient to show to justify the joint trial that stolen property has been transferred by one offence.

(2) that the addition of a new charge under S. 395 at the end of the trial to get over a technical objection could not be approved.

(3) that the omission to direct the jury to the question whether the property was really the stolen property amounted to a material misdirection as it was an essential condition of an offence under S. 411, that the property in question should be identified as the stolen property.

(4) and that in the absence of such identification the conviction was wrong and ought to be set aside.

B. Somayya and E. Krishnamurti for Appellant.

The Public Prosecutor for the Crown.

C. A. S.

Wallace., J.
6th February, 1924. } S. A. No. 402 of 1922.

Letter of agreement—Default of another—If a guarantee—Cause of action different.

Where *A* executed a promissory note in favour of *B* and *C* executed a letter of even date to *B*, agreeing that *A* would pay the amount in 3 months and in default, he, *C*, would get an assignment of the pronote from *B* and pay the amount, ***held*** that *C* was not a surety for the payment and that the cause of action against *C* was only on a breach of the contract as evidenced by the letter.

C. V. Ananthakrishna Iyer for the Appellant.

T. R. Ramachandra Iyer and *T. D. Srinivasachari* for the Respondent.

The Officiating Chief Justice and Kumaraswami Sastri, J.
8th February, 1924 — A. S. No. 282 of 1922.

Hindu Law—Adoption—Ante adoption agreement—Agreement by natural father with the adoptive father that the son should take the adoptive father's estate subject to his disposition by will—Binding nature of agreement on the adopted son—Test of reasonableness of such agreement.

It is open to the natural father to bind his minor son by an agreement that he should take the properties of his adoptive father subject to a reasonable disposition by him under his will,

12 M, 490, 27 M. 577 followed.

The test of reasonableness of the disposition by the adoptive father is not to be viewed by treating the adopted son as being in existence as such, at the date of the disposition.

43 B. 542 dissented from.

A. Krishnaswami Aiyar and C, A. Seshagiri Sastri for the Appellant.

S, Srinivasa Aiyangar and N. S. Srinivasa Aiyar for the Respondents.

C, A. S.

Phillips and Odgers, JJ.
11th February, 1924. — C. M. A. No. 83 of 1924.

Insolvency—Hindu joint family—Joint debt—Adjudication—Single petition, if sufficient.

Where the members of a joint Hindu family carry on a family business and debts are incurred in connection with the same, they can all be adjudicated insolvents by means of a single petition. It is not necessary that separate petitions should be filed in respect of each. 40 Mad. 810 followed.

A. Swaminatha Aiyar for Appellant.

T. M. Krishnaswamy Aiyar for Respondents.

T. S. V.

Phillips and Odgers, JJ. } C. M. A. No. 241 of 1923.
11th February, 1924. }

C. P. Code, O. 21, Rr. 58, 63—*Exonerated Defendant—Claim petition—Dismissal as too late—Suit if lies—Effect of dismissal—Res-judicata in execution proceedings.*

An exonerated defendant in a suit put in a claim petition to raise an attachment but it was dismissed as too late. On appeal the decision was affirmed on the ground that the claim was filed too late. He then filed a suit within one year of the original order of dismissal for a declaration that the property was not liable to attachment. *Held* S. 47, C. P. C. was a bar to the maintainability of the suit but it could be converted into a petition in execution; *held* further that the decision in the prior proceedings would not be *res-judicata* in the subsequent proceedings as there was no adjudication on the merits,

K. V. Sesha Aiyangar and *K. Aravamudu Aiyangar* for Appellants.

Thiruvenkatachariar for *K. Bashyam Aiyangar* for Respondents.

T. S. V.

Phillips and Odgers, JJ. } C. M. A. No. 61 of 1923.
12th February, 1924. }

Judicial Committee Act (3 *and* 4 *William IV, ch.* 41) *S.* 23—*Death of respondent pending appeal to the Privy Council—Effect—Legal representative not brought on record—Decree if can be executed against legal representative—Time for impleading in execution—Limitation Act, Art.* 181.

A respondent died during the pendency of an appeal to his Majesty in Council but his legal representatives were not brought on record and in ignorance of his death a decree was passed against him. When the decree was sought to be executed against his heirs, they contended that the decree was null and void so far as the deceased respondent was concerned. *Held* by virtue of S. 23 of the Judicial Committee Act, the respondent must be deemed to have been alive on the date of the decree and the same can be executed against his legal representatives. *Held* further if art. 181 of the Lim. Act applies to an application to bring on record the legal representatives for the purpose of

executing the decree, time runs from the date of the Order in Council and not from the date of death.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

C. S. Venkatachari and *V. N. Venkatavaradachari* for Respondent.

T. S. V.

Ramesam and Jackson, JJ.
12th February, 1924.
A. S. No. 307 of 1921.

Costs—Maintenance suit—Award of proportionate costs, to be paid and received—Propriety of.

Where the widow of a deceased co-parcener sued the other co-parcener of a joint Hindu family for maintenance at the rate of Rs. 40 per month and the Court decreed maintenance at the rate of Rs. 10 only per month and directed the parties to pay and receive proportionate costs on the amount decreed and disallowed respectively. *Held*, that the plaintiff in a suit for maintenance was entitled to costs on the amount decreed and that the defendants were not entitled to costs on the amount disallowed.

Watrap S. Subramania Aiyar for the Appellant.

S. T. Srinivasagopalachariar for the Respondent.

Ramesam and Jackson, JJ.
13th February, 1924.
A. S. No. 186 of 1921.

Hindu Law—Widow—Adoption with assent of sapindas—Validity—Conditions—Seeking for assent--What amounts to—Assent obtained by corruption—What amounts to—Effect—Motives of widow in making adoption—Inquiry into—Propriety—Refusal of sapinda to assent—When proper and when not—Daughter's son—Assent of—If and when necessary—Authority of sapinda to adopt "any boy at any time"—Validity—Adoption in pursuance of assent long after same is given—Validity—Registered letter—Return of, unopened with endorsement "adressee does not want it"—Correctness of endorsement—No presumption as to.

An adoption by a Hindu widow purporting to have been made with the assent of sapindas *held* invalid because, of the two

nearest agnates, it was not proved that one of them was ever consulted, and the consent of the other was proved to have been corruptly obtained.

The assent of the daughter's son of a deceased Hindu, when he is the next heir and *sui juris,* is necessary to the validity of an adoption made by the widow of the deceased.

Where a letter sent by registered post is returned unopened with the endorsement "the addressee does not want it", there is no presumption that the endorsement is correct.

It cannot be held that a registered letter to a person containing a request to consent to an adoption—the letter never being opened by him and returned —is a valid consultation.

Where the motives of a widow in making an adoption may or may not be questioned, the courts are bound to examine the sapinda's motives in giving the particular consent.

The consent of a sapinda obtained by the promise of a payment is one corruptly obtained.

There is an essential difference between the authority of a husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time after the consent is given. When the interval is short, the death of the sapinda may not matter, but a sapinda's assent is not to be pocketted by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may arise.

An authority given by a sapinda to a widow to adopt "any boy at any time" is too general.

Though a sapinda is, when asked to do so, bound to assign his reasons for refusing to assent to an adoption, his refusal is not invalid merely because he does not assign any reasons for the same.

Refusal of a sapinda to assent to an adoption when proper and when not.

Per Jackson, J.—The consent of the next heir is not essential to an adoption by a Hindu widow. Cases may, no doubt, occur where to prove its bona fides the family council would have acted prudently in consulting the daughter's son. There is no inflexible rule ; but there must be good evidence that the widow was actuated neither by caprice nor corruption. Such

evidence is best supplied by the proved consent of the nearest agnates of her deceased husband. The consent of the daughter's son would also be valuable evidence ; but he is not entitled to be consulted as he is not a *gnati.*

A. Krishnaswami Aiyar, P. Satyanarayana Rao and *K. Balasubramany Aiyar* for Appellants.

B. Somayya and *E. Krishnamurti* for Respondents.
A. S. V.

Kumaraswamy Sastry, J.
13th February, 1924. } S. A. No. 340 of 1921.

Appeal—Right of—Co-defendants—Suit dismissed as against appellant but finding against—Res Judicata.

The plaintiff as lessee sued for a declaration of his rights as against his lessor and the assignee of the right, title and interest of the lessor's father. Both the Courts below held that the lessor and his father were undivided, that the suit properties did not fall to the lessor's share and dismissed the suit.

The lessor appealed to the High Court. *Held* he had a right of appeal as the decision of the courts below would otherwise be *res judicata* as between the co-defendants.

B. Somayya for Appellant.

K. Krishnaswami Aiyangar for Respondent.
T. S. V.

Spencer and Kumaraswamy Sastry, JJ.
13th February, 1924.
A. S. No. 129 of 1921.

Ejectment—Inamdar—Zamindar—Inam grant whether comprises land or melvaram only—Right of resumption—Burden of proof—Plea of permanent tenancy.

Where in a suit in ejectment the tenant sets up the defence of a permanent occupancy right, the burden of proving that he has such a right is on the tenant.

Where a Zemindar seeks to resume a service inam and eject the inamdar, he must prove his right to resume and also that the original grant was of the land and not merely of the melwaram. Where as in the present case the evidence falls short of establishing that the land itself was granted in inam, the Zamindar on resumption can only recover the assessment on the land. 41 M. 1012; 43 M. 567; 43 M, 166. (P. C.) Appeal No. 46 of 1922 Referred to.

A. Krishnaswami Iyer for Appellant.

V. Ramadoss for Respondent.

A. V. V.

Wallace., J.
14th February, 1924.
S. A. No. 593 of 1921.

Limitation Act, Art, 116*—Company—Suit for dividend—Share-holder and assignee—Difference between—Company if a trustee—Entry in balance sheet—If an acknowledgment within* S. 119.

(1) The decision in 42 Mad. 33 which lays down that the period of limitation for the recovery of a dividend by a shareholder against the company is six years under Art. 116 of the Limitation Act applies only to a case where a shareholder is suing as such, and not as a purchaser from a shareholder before his rights are recognised by the Company.

(2) The legal position of a Company is not that of a trustee on behalf of shareholders for dividends declared.

(3) The mere entry of dividends in the balance sheets of the Company does not amount to an acknowledgment within S. 19 of the Limitation Act.

N. R. C.

T. S. Raghunatha Rao and *T. S. Srinivasa Rao* for Appellant.

P. Satyanarayana Rao for Respondent.

T. S. V.

Waller, J.
15th February, 1924. } S. A. No. 664 of 1921.

Transfer of Property Act, S. 98 Anomalous Mortgage—Covenant to pay—Usufructuary mortgage—Transaction to be treated as sale if money not paid in two years—Suit an mortgage after two years—If maintainable.

Under the terms of a mortgage, the mortgagee was put in possession, the amount was to be paid in two years and in default the transaction was to be treated as a sale, After the two years' period, the mortgagee sued on the document for the money lent and the mortgagor set up the defence that it was an anomalous mortgage and the rights of the parties could be worked out only as per the terms of the contract. *Held,* there was a definite covenant to pay and therefore it was not an anomalous mortgage; and though possession was with the mortgagee, he was entitled to sue for recovering his money. 43 Mad. 589; 27 526; 38 Mad. 667; referred to.

V. Ramdoss for Appellant.

P. Chenchiah for *P. Venkataramana Rao* for Respondents.

T. S. V.

Wallace, J.
15th February, 1924. } S. A. No. 655 of 1921.

Contract Act, S. 91—Sale of goods—Commission agent for buyer—Consignment of goods by railway—Goods not insured—Loss of goods—Liability of agent—Interest—Equitable relief.

A commission agent for a buyer is only in the position of an agent except as regards the right of stoppage in transit. He is not a vendor so as to make the provisions of S. 91 of the Contract Act apply to a consignment of goods by him. *Ireland* v. *Livingston*, L. R. 5 H. L. 395; *Cassaboglou* v. *Gibb* 11 Q. B. D. 797; 13 B. 470 Referred to.

Where a commission agent for a buyer usually sends goods by railway parcel without insuring them, the goods are at the risk of the buyer from the moment of their delivery to the

Railway in the usual course of business and damages arising from the loss of any particular consignment cannot be debited to the agent. It is open, to the Court to award interest as damages apart from the Interest Act.

41 M. 661 Ref.

A. Krishnaswami Aiyar and *K. V. Ramachandra Iyer* for Appellant.

S. Doraswami Iyer for Respondent.

A. V. V.

Krishnan, J.
18th February, 1924. } S. A. No. 693 of 1921.

Inam—Purchase at Court sale—Inalienability not set up—Mortgage—Redemption—Plea of inalienability—Estoppel.

In a suit for redemption of *bariki* service *inam* lands purchased by the plaintiff at a Court auction sale and afterwards mortgaged the defence set up was that the lands were inalienable under the Madras Proprietary Estates Village Service Act (II of 1894) and the Madras Hereditary Village Services Act (III of 1895). The suit having been dismissed by the Courts below, it was contended in second appeal that as the defendant's predecessor in title did not set up the inalienable nature of the lands at the time of attachment or sale or take any steps to have the sale set aside, and as the defendant himself was one of the bidders at the auction sale, he was estopped from contending the sale was invalid. *Held*, following 34 M. L. J. 17 (F. B.) that the court sale need not be set aside where the defendant purchased the lands after enfranchisement and that he was not estopped from setting up the invalidity of the sale.

C. Rama Rao for Appellant.

K. Venkatarama Raju for Respondent.

T. S. V.

Venkatasubba Rao, JJ.
18th February, 1924. } S. A. No. 1036 of 1921.

Res judicata—Ex-parte decision on prior occasion—Suit for possession against tenant—Prior decision if binding on tenant.

A suit for possession of lands was filed by *A* on behalf of his family against the tenant *B* and against *C* another member

of the family who disputed the right of *A* to file the suit, claiming it for himself. In a previous suit by *A* against *C*, it had been decided that *A* had the right and not *C*, but it was an *ex parte* decree.

Held, (1) the prior decision though *ex parte* operated as *res judicata* as between *A* and *C*. 17 C. W, N. 627; 13 C. L. J. 38 followed.

(2) it was conclusive against *B* also—*Dicta* in 44 Mad. 778 (F. B.) followed.

K. V. Madhavan Nair for *K. Sankara Menon* for Appellant.

K. Kuttikrishna Menon for Respondent.

T. S. V.

Krishnan, J.
19*th February*, 1924. } S. A. No. 180 of 1921.

Landlord and tenant—Occupancy rights—Acquisition of—Adverse possession.

So long as the relationship of landlord and tenant subsists, the tenant cannot acquire occupancy rights by adverse possession. 19 L. W. 259 (P. C.) followed.

K. Aravamudu Aiyangar for *K. G. Srinivasan* for Appellant

M. S. Venkatarama Aiyar for *T. R. Venkatarama Sastry* for Respondent.

T. S. V.

Spencer, J.
19*th February* 1924. } Crl. Rev. Cases Nos. 206 and 207 of 1922.

Criminal Procedure Code, S. 145 (5)—*Proceedings under—Statement put in—Dropping proceedings without taking evidence—Validity—Sale of cultivation right—Deposit of money in Court.*

In possession proceedings under S. 145, Cr. P. Code, a preliminary order was passed and parties were asked to put in statements and adduce evidence in support of the same. The counter petitioner put in a statement that there was no apprehension of any breach of the peace and based on that the Court dropped the proceedings and directed the money obtained by sale of cultivation right to be deposited in Court pending the establishing of title in a civil court. *Held*, (1) proceedings

under S. 145 could be dropped on the strength of statements filed under S. 145 (5) and no evidence need be taken to support the same. 30 Cal. 112 followed ;

(2) the direction to deposit in court the money realised by sale of the cultivation right instead of giving it to the party from whose possession the lands were taken is perfectly valid. 1 L. W. 1032 followed ; 17 L. W. 492 not followed.

K. Venkatarama Raju for Petitioner.

V. Ramadoss for Respondents.

T. S. V.

Krishnan, J.
19th February, 1924. } S. A. No. 796 of 1921.

Limitation Act, Art. 120—*Insolvency—Suit by Receiver to have mortgage by insolvent declared invalid—Cause of action—Right of creditors—If individual or representative.*

A Receiver in insolvency brought a suit in 1918 under S. 53, T. P. Act, to have a mortgage by the insolvent made in 1908 declared not binding on the creditors. The insolvency petition was put in, in 1909 but the final order adjudicating him an insolvent was passed by the High Court in 1914. *Held*, Art. 120, Lim. Act applied to the suit. Every creditor has an individual cause of action in respect of the alienation sought to be impugned, and if under art. 120 some at least of the creditors are not barred, the suit by the Receiver would be in time. 43 Mad. 760 (F. B.) relied on.

N. Rama Rao for Appellant.

V Suryanarayana for Respondent.

T. S. V.

Spencer and Wallace, JJ.
21st February, 1924. } Crl. Rev. Case No. 677 of 1923.

Criminal Procedure Code, S. 438—*Reference by District Magistrate—Enhancement—Prior dismissal of revision petition by accused—Summary dismissal—Reference if proper—Scope of S.* 369 *and the newly added S.* 439 (6).

After conviction and a revision petition by the accused against the same had been summarily dismissed by a Judge of the High Court without notice to the Public Prosecutor, it is open to the District Magistrate to make a reference to the High

Court under S. 438, Cr. P. Code, for enhancing the sentence imposed. The scope of S. 369 and the newly added subsection 6 to S. 439 considered. 46 Mad. 382 and 23 M. L. J. 371 distinguished.

The Public Prosecutor (*J. C. Adam*) for the Crown.

Dr. Swaminathan and *K. G. Srinivasa Aiyar* for the accused.

T. S. V.

Waller, J.
21st February, 1924. } C. R. P. Nos. 910 to 913 of 1923.

C. P. Code, S. 10—*Stay of trial—the matter in issue directly and substantially in issue—Whether means all the matter or some matter materially in issue—Court having Jurisdiction to grant relief—What it is.*

The petitioners applied to the Sub-Judge under S. 10, C. P. C., for stay of trial of certain suits before him, pending disposal of second appeals filed in the High Court, against the judgment of the District Munsif, on the ground that the main questions in issue in the second appeals are also substantially in issue in the cases pending in sub-court. The Sub-judge dismissed the petitions holding that all the issues in both the cases must be common in order to invoke the application of S. 10. C. P. C., following 15 L. W. 646 a judgement of Venkatasubba Rao, J.

Held (1). That the matter in issue does not mean all the matters in issue, but only means some material matter in issue and, as such all the issues in both suits need not be common. 15 L. W. 646—dissented.

(2) That S. 10 will only apply when the two courts are of concurrent jurisdiction and not when some cases are before the District Munsiff and some before the sub-judge, in which the case the courts are not of concurrent jurisdiction.

V. Viyanna for the Petitioner.

C. Ramarao for the Respondent.

Ramesam and Jackson, JJ.
22nd February, 1924. } A. S. No. 32 of 1924.

Appeal—Forum—Determination of—Guiding factor—Date of suit or appeal—Jurisdictional value changed by Madras Court Fees Amendment Act (*V of* 1922)—*Effect.*

A suit filed in a Subordinate Judge's Court was valued for purposes of jurisdiction at Rs. 3,000, being 5 times the revenue, as under S. 7 (5-*b*) of the Court Fees Act (VII of 1870). By the time the appeal was filed the Madras Court Fees Amendment Act (V of 1922) had come into force and the jurisdiction and court fees valuation became thereunder 10 times the revenue and as such above Rs. 5,000. On the appeal being filed to the High Court, objection was taken that the forum of appeal must be decided on the jurisdiction value as shown in the plaint and that it was a vested right. *Held* the appeal lay to the High Court, the forum of appeal being determinable under the Civil Courts Act upon the value of the subject matter of the suit as on the date of appeal calculated under the Court Fees Act then in force. 4 Mad. 220 folld : 40 Mad. 1 distinguished.

T. V. Muthukrishna Aiyar and *N. Muthusami Aiyar* for Appellant.

T. R. Ramachandra Aiyar and *K. S. Venkatramani* for Respondents.

T. S. V.

Phillips and Odgers, JJ.
22nd February, 1924. } C. M. A. No. 60 of 1923.

Execution proceedings—Assignee of decree—Application for recognition--If a step-in-aid--Application for transmission of decree—Plea of limitation not raised—Res-judicata—Attachment of decree before judgment—Stay of execution — Limitation Act, S. 15 (1).

An application by an assignee of the decree-holder of a recognition of his rights is a step-in-aid of execution and saves limitation even if it subsequently turns out that he has no valid title.

Where such assignee applies for a transmission of the decree for purposes of execution and the judgment debtor though served with notice fails to set up a plea of limitation open to him, the principle of constructive *res judicata* applies and the latter cannot thereafter raise the contention that execution is barred.

Where there has been an attachment before judgment of a decree, it operates as a stay of execution and the period of its

duration can be excluded under S. 15 (1), Limitation Act for the purpose of limitation in executing the decree.

T. Ramachandra Rao and *N. Mangapathi Naidu* for Appellants.

P. Somasundaram and *P. Satyanarayana* for Respondents.

T. S. V.

Krishnan J,
22nd February, 1924. } S. A. Nos. 998, 999 and 1000 of 1921

Will-Executors—Executors under the will of a Hindu disposing of ancestral property—Promissory notes executed by executors—Personal liability—Liability of trustees and guardians.

Where executors appointed in a will by a Hindu testator which was subsequently found to be invalid as the properties disposed of were ancestral properties, have executed promissory notes in renewal of prior pronotes, have entered upon the estate and managed it, they are liable personally upon the pronotes executed by them.

22 M. L. T. 180, 32 M. L. J. 259, 33 M L J 631 45 C 238 Ref.

Case of pronotes executed by guardians of minors, agents of principal or trustees of temple stand on a different footing.

Where the guardians of the minor executed promissory notes in renewal of prior pronote debts of the minor's father, in which they expressly hold themselves liable to pay the debts

Held that the guardians are personally liable upon the pronotes. 42 M 180 F. B. and 39 M 915 distinguished.

The appeals were allowed.

P. Somasundaram and Pappu Satyanarayana for Appellants in all the cases.

S. Varadhachariar and B. Satyanarayana for Respondents in all the cases.

C. A. S.

Ramesam and Jackson, JJ. } A. S. No. 141 of 1921.
25th February, 1924. }

Madras Hindu Transfers and Bequests Act (I of 1914)—*If retrospective—Hindu will—Devise in favour of unborn children—Effect.*

A Hindu executed a will in 1876 bequeathing all his property in favour of his widow and daughters for life with rights of survivorship and the remainder to his daughter's sons if any begotten. He died in 1878, and a son was born to one of his daughters in 1881 but died in a day or two. The widow died in 1902 and the last of the daughters in 1918 without any male issue. *Held* the bequest in favour of the grandsons vested in law in 1881, but was void as being in favour of unborn persons, also Madras Act I of 1914 could not operate retrospectively so as to validate such a void bequest.

S. Varadachariar and *Rajagopala Aiyangar* for appellant.

A. Krishnaswamy Aiyar, M. S. Venkatarama Aiyar and *Thyagaraja Aiyar* for respondents.

T. S. V.

The Chief Justice and Ramesam, J. } S. A. No. 410 of 1921.
26th February 1924. }

Limitation Act, Art. 134—*Religious endowment—Trustee—Mulgeni lease—Suit to set aside—Limitation.*

Where the trustee of an endowment grants what purports to be a mulgeni lease of the trust lands it should ordinarily be construed to be only a lease for his life and a suit brought to set it aside more than 12 years from the date of the lease but less than 12 years from his death or removal is not barred under Art. 134, Limitation Act. 44 Mad. 831 (P. C.) referred to.

B. Sitarama Rao for appellant.

V. Narayana Aiyar for *S. T. Srinivasagopalachari* for respondents.

T. S. V.

N. R. C.

Krishnan, J.
26th February, 1924. } S. A. No. 1054 of 1922.

Madras Hereditary Village Offices Act (*III of* 1895) *S.* 21—*Carpenter service inam—Proprietary Estate—Suit for emoluments—Civil Court—Jurisdiction.*

A suit for emoluments in respect of a carpenter service inam lands in a Proprietary Estate is not maintainable in a Civil Court, but must be filed in a Revenue Court. 33 Mad. 208 followed.

N. Chandrasekhara Aiyar for appellants.

W. Kothandaramayya for respondent.

T. S. V.

The Chief Justice and Ramesam, J.
27th February, 1924. } A. S. No. 248 1921.

Madras Estates Land Act (*I of* 1908) *S.* 125—*Applicability—Sale of holding—Collusion between ryot and purchaser—Object of defeating mortgagee—Effect.*

The principle of S. 125, Estates Land Act, will not apply to a case where the ryot in collusion with the auction purchaser makes default in payment of the rent in order to defeat an encumbrance on the property created after the Act came into force. In such a case the purchaser takes subject to the encumbrance. 26 Mad. 285 followed.

K. V. Venkatasubramania Aiyar for appellant.

K. Jagannatha Aiyar for respondents.

T. S. V.

Krishnan, J.
27th February, 1924. } S. A. No. 2 of 1923.

Malabar Law—Nambudri Brahmins—Whether become outcastes in consequence of imprisonment—Karnavan of a Nambudri Illom, ex-officio uralam of a Devaswom-Karnavan in prison—Senior Anandravan, if can act as a defacto uralan--Senior Anandravan acting as defacto uralan—Grant of melcharath along with other two uralans—De jure uralan available but not consulted—Melcharath, if valid.

A Nambudri Brahmin who has undergone imprisonment and who has been on jail died during such imprisonment becomes an outcaste.

Where the karnavan of a Nambudri Illom which has an uraima right over a Devaswam is in prison, the Illom can be represented in the uraima by the senior anandravan.

Where such senior anandravan acting as the *defacto* uralan grants a melcharath of Devaswom properties along with the other two uralans and the kanamdar objected to its validity on the ground that the karnavan who alone was the *de jure* uralan had not been consulted and did not join in granting the melcharath.

Held, that the Illom and its uraima right had been sufficiently represented by the senior anandravan who acted as the *de facto* uralan and (2) that the melcharath was good.

S. A. No. 1136 of 1914, A. S. No. 170 of 1919 and 9 M. 80 followed.

15 L. W. 264 and 44 Mad. 891 (F. B.) referred to.

Watrap S. Subramania Aiyar and *A. S. Srinivasa Aiyar* for appellant.

B. Sitarama Rao and *S. Venkatachellam Sastry* for respondent.

C. A. S.

Phillips and Odgers, JJ.
28th February, 1924. } C. C. C. A. No. 40 of 1922.

Madras City Tenants' Protection Act (III of 1922)—Applicability—Temple lands—Trustees—If within the Act.

Their Lordships referred to a Full Bench the question whether the Madras City Tenants' Protection Act (III of 1922) applies to landlords who are trustees of religious endowments in Madras.

V. Sivaprakasa Mudaliar and *C. V. Mahadeva Aiyar* for appellant.

N. Chandrasekara Aiyar for respondents.

T. S. V.

Krishnan, J. }
28th February, 1924. } S. A. No. 860 of 1921.

Malabar Law—Moplas following Mahomedan Law—Gift to mother and brothers—Right to enjoy as tarwad property—Validity Custom—Effect.

Where a Mopla governed by Mahomedan Law gifts certain properties to his mother and brothers with the conditions that they should live together as a *tarwad,* that the children of the donees should have rights in the same and that the donees should not alienate them but enjoy the same as *tarwad* properties. *Held* the gift deed is repugnant to the principles of Mahomedan Law and as such invalid. Even if there is a custom recognizing such a gift, it is invalid as opposed to public policy.

K. P. Ramakrishna Aiyar for appellant.

K. Krishna Menon and *P. Govinda Menon* for respondents.

T. S. V.

Phillips and Odgers, JJ. }
28th February, 1924. } C. M. A. Nos. 47 and 48 of 1922.

Civil Procedure Code, S. 48—Fraud--Evasion from arrest—If amounts to—Limitation.

Where the judgment debtor evades arrest for 12 years from the date of the decree, it amounts to fraud within the meaning of S. 48, C.P. Code, and the decree-holder gets a fresh starting point of limitation for purposes of execution. 6 Mad. 365 and 12 L. W. 710 followed; 8 M. L. J. 203 dissented from.

V. Rajagopala Aiyar for appellant.

V. Tyagaraja Aiyar for respondent.

T. S. V.

Jackson, J. }
28th February, 1924. } C. R. P. No. 587 of 1923.

C. P. Code, S. 115—Material irregularity—Plaint—Refusal to allow amendment of—Amplification of cause of action.

A plaintiff alleging that he had just come of age sued to set aside a sale on the ground of fraud and undue influence during his minority. He applied for amendment of his plaint

and wanted to add fuller details as to his youth and also that on the date of the sale deed and of the plaint he was in fact less than 18 years of age. The court below refused the amendment on the ground that it would introduce a new cause of action. *Held* that the amendment sought for was only an amplification of the cause of action as originally laid and that the refusal being the denial of a right to raise a vital plea amounted to material irregularity in the exercise of jurisdiction which would justify interference in revision.

K. V. Krishnaswamy Aiyar and *S. R. Muthuswamy Aiyar* for petitioner.

K. Bhashyam Iyengar, and *K. V. Srinivasa Aiyar* for respondents.

T. S. V.

Venkatasubba Rao, J.
28th February, 1924. } Cr. R. C. No. 490 of 1923.

Evidence—Police report—Record of statements at an identification parade—Inability of persons who made the statements to recollect them before court—Whether the statements could be used as evidence—Hearsay.

A report drawn up by a police officer at an identification parade recording statements made by certain persons regarding the offence is hearsay and inadmissible in evidence; when the persons who purported to make the statements concerned were cited as witnesses for the prosecution and confessed before the Magistrate that they did not remember anything about the offence and could not identify anything of the accused, conviction and sentence set aside.

V. Govindarajachari for the Petitioner (Accused).

The Public Prosecutor for the Crown.

C. A. S.

Spencer, and Kumaraswami Sastri, JJ.
29th February 1924. } A. S. No. 73 of 1921.

Benamidar and real owner—Decree against both—Sale in execution of property in name of benamidar—Sale set aside on application under O. 21, R. 89, C. P. C. by benamidar claiming

title as real owner—Mortgage of that property by benamidar for raising money for setting aside sale—Mortgagees rights against real owner and purchasers of property from him—Contract Act—Ss. 69, 70—T. P. Act—S. 101—Applicability— Conditions — Change—Property subject to—Purchase of property without notice of charge---Effect as against charge-holder—Benami—Advancement—Presumption of---Husband---Purchase of property in wife's name—Ownership—Presumption—Onus of proof.

A purchased property *benami* in the name of his wife B. In a promissory note executed by A. and B. a suit was instituted against them and their son C, and, in that suit, a personal decree was passed against A. and B. while a decree to the extent of the family properties was passed against C. The property purchased in the name of B. as aforesaid was sold in execution of that decree, whereupon C. filed an application under O. 21, R. 89, C. P. C., claiming that the property belonged to his mother and that she, who died in the interval, bequeathed the same to him. The money required for being deposited in Court was raised by C. by a mortgage of the same property to the plaintiff. On the necessary deposit being made the sale was set aside.

In a suit to enforce the mortgage instituted by the plaintiff against A, C. and purchasers of the mortgaged property from A. *held*, that the plaintiff was entitled to a decree for the amount which went to set aside the court sale.

Per Spencer, J. : C. (the son), as reversionary heir of A (the father) was sufficiently interested in the preservation of the property to be entitled to redeem it under S. 91 of the T. P. Act, or to apply to have a court sale set aside under O. 21, R. 89, C. P. C. He was entitled to an equitable lien for the amount of the money so advanced. The son acted neither speculatively nor officiously in paying the money that the father was bound to pay as well as himself. The plaintiff having obtained an assignment of the son's rights through the suit mortgage deed was entitled to recover the amount by way of charge on the redeemed properties.

Per Kumaraswami Sastriar, J. Where property is sold in execution of a decree against the real owner and the benamidar repurchases the property or raises money for the purpose of setting aside the sale, it is contrary to all principles of equity

and justice to hold that the real owner who took no steps to discharge the decree and who allowed the property to be sold could step in and claim the property free from any obligation to repay the money borrowed by the benamidar for the purpose of setting aside the sale.

Where there is a charge on immoveable property, a purchaser thereof, although without notice of the charge, takes it only subject to the charge.

Where a person makes a payment in the assertion of a hostile title and for the protection of his own interests in order to save property which he claims to be his from passing out of his hand, the mere fact that the other party is benefited will not, if it is found that the person making the payment has no title, entitle him to be reimbursed. The interest contemplated by S. 69 of the contract Act is an existing interest which the payment is intended to protect, and not an interest which is created by the payment itself.

S. 70 of the Contract Act has no application where the person making the payment makes it for himself and not for the person against whom the claim for reimbursement is made.

S. 101 of the T. P. Act does not create a secuirty where there was no security before. The mere fact that a person setting up a hostile title discharges incumbrances which the other party was liable to discharge would of itself give no right.

There is no presumption of advancement where property is purchased by a husband with his own funds in the name of his wife, and the onus of proving that the purchase in such a case was intended to be for the benefit of the wife is on the party who sets up such a case. The fact that almost all the property purchased by the husband was purchased in the name of his wife is a very strong circumstance to show that he did not intend the purchase to be for her benefit.

T. Rangachariar, and *V. N. Venkatavaradachariar*, for appellants.

K. Bashyam Iyengar for 1st and 2nd respondents.

A. Srirangachari for 3rd respondents.

P. T. Kuppanna Rao and *S. Nagaraja Iyer* for 4th respondent.

Jackson, J.
6th March, 1924. } C. R. P. Nos. 808 and 809 of 1922.

C. P. Code, Ss. 94, 151 *and O.* 30, *R.* 2—*Madras District Municipalities Act—Rules framed under—Rule* 6—*Election dispute—Inquiry into—Interim injunction pending enquiry—Power of Court to grant.*

Rule 6 of the rules framed by the Local Government under the Madras District Municipalities Act provides that the procedure at an enquiry by the Court into the legality of an election shall as far as may be applicable be in accordance with the procedure prescribed by the Code of Civil Procedure. Relying on this provision the Court below granted an interim injunction restraining the successful candidate at an election to a Municipal Council from taking his seat in the Council pending the disposal of an objection petition questioning the validity of the election. On revision, *held* that the Court below had no power to issue the interim injunction ; that R. 6 of the rules framed by the Local Government had not the effect of making the provisions of S. 94 and O. 39, R. 2 of the C. P. Code applicable to inquiries into election disputes; that the Court had not inherent powers apart from these provisions to issue an injunction ; and that the order of the Court below granting an injunction was without jurisdiction and must be set aside.

Aslatt v *Corporation of Southampton* 16 Ch. D. 143; *Richardson* v *Methely School Board* 3 Ch. D. 150 ; 45 M. L. J. 23 Ref.

Dr. S. Swaminathan for petitioner.

T. R. Venkatrama Sastri & K. S. Sankara Iyer for respondent.

A. V. V.

Wallace, J.
6th February, 1924. } S. A. No. 575 of 1921.

Contract Act, S. 74—Penalty—Award of reasonable compensation by the first Court—Discretion—Interference by the appellate Court.

Where a mortgage bond provided for interest to be paid at 12 per cent per annum and the mortgage amount was payable at the end of one year, failing which the document provided that compound interest at 15 per cent with 12 monthly rests should be paid from the date of default and the 1st Court found the provision for enhanced interest was by way of penalty and awarded 15 per cent simple interest but the lower appellate Court agreed with the 1st Court that the provision was penal but awarded interest at 15 per cent and the interest on such interest at 12 per cent *held*, that the appellate Court ought not to have interfered with the discretion of the 1st Court in the matter of awarding compensation under S. 74.

C. A. Seshagiri Sastri, for the Appellants.

V. Thiagaraja Aiyar, for *S. Doraisami Aiyar*, for the Respondents.

C. A. S.

Spencer and Devadoss, J.
4th March, 1924. } C. R. P. No. 796 of 1921.

Practice—Hearing of a cause by a bench of judges—Temporary absence of one of the judges on deputation at the time of the delivery of the judgment—Another judge officiating in the place of the judge on deputation—Whether the judgment of the judge on deputation at the time a valid judgment in the cause.

An objection was taken to the validity of a Full Bench judgment delivered on the 17th of December 1923 in which their Lordships were divided in opinion, three learned judges taking one view and two learned judges taking the contrary view, on the ground that Mr. Justice Coutts Trotter who was one of the judges that sat in the Full Bench and heard the reference was absent on deputation in connection with the enquiry of the Indian Bar Committee at the time when the judgment of the Full Bench was delivered. His Lordship's judgment was in support of the majority view in the Full Bench. An objection

was taken that His Lordship was not a judge of the High Court during the temporary absence of his service in the Bar Committee, because another judge was officiating in his place. *Held*, that His Lordship's judgment was a valid judgment of a udge, as there was no resignation and he did not cease to be a judge of the High Court during his temporary absence on other service.

9 W. R. 1 and 35 M. 47 distinguished.

Their Lordships therefore overruled the objection that the judgment of Mr. Justice Coutts Trotter should not be treated as part of the judgment of the Full Bench.

K. Balasubramania Aiyar for the Petitioner.

A. Swaminatha Aiyar for the Respondent.

C. A. S.

Coutts Trotter, C. J. and
Ramesam, J.
4th March, 1924.
S. A. No. 863 of 1921.

Civil Procedure Code O. 21, r. 63—Limitation Act, Schedule II, article 11—Claim " not pressed now, dismissed "—If an order against claimant—Proper order in such a case—Form of.

Where a claimant appeared before the executing court on the fourth day after filing his claim petition and said he did not wish to proceed with it, and the court made the order " Not pressed now, dismissed," *held*, this was not an order against the claimant within the meaning of O. 21, R. 63, Civil Procedure Code and the claimant was not bound to bring a suit to establish the right claimed to the attached property within the year prescribed by article 11, schedule II of the Limitation Act.

The proper order to make in such a case would be that the petition was withdrawn and therefore no orders thereon were necessary.

K. N. Rajagopal Sastri for *R. Narasimham*, for the Appellants.

V. Suryanarayana for the Respondents.

C. A. S.

Venkatasubba Rao, J.
4th March, 1924.
Crl. Rev. Case 959 of 1923.

Whipping Act S. 3—Fine—Imposition of—If can be imposed in addition to whipping—Punishment—What is.

Where a court decides to deal with an accused under the whipping Act in lieu of punishing him under the Penal Code, it has no power to impose a fine in addition to the whipping. The term 'punishment' in S. 3 means the total punishment awardable and once whipping is awarded, no other punishment can be imposed. 16 Bom. 357 followed.

The Public Prosecutor (J. C. Adami) for the Crown.

P. G. Krishna Aiyar, for the Accused.

T. S. V.

Phillips and Odgers, JJ.
4th March, 1924. } C. M. A. 237 of 1922.

Limitation Act, Art. 182—*Compromise decree—Trust property—Turn of management—Application by widow to be brought on record as legal representative and to execute decree—Devolution of rights.*

A compromise decree was passed in 1912 in a suit between two brothers by which they agreed to manage a certain trust by rotation, the period of each turn being fixed as two years. One of the brothers died in 1917 and his widow applied in 1922 to be brought on record as his legal representative and to execute the decree and obtain for herself her husband's turn of management for 1921 and 1922. The surviving brother objected that the decree could not be executed by the widow as there was no devolution of rights in her favour and also that the prior application to execute being only in 1913, her application was barred under art. 182, Limitation Act.

Held, (1) in the absence of proof of usage to the contrary, trust property would devolve as any other property and as such the widow could execute the decree. 9 Cal. 766 (P. C.) followed.

(2) the right to a turn of management being a right recurring once in two years, art. 182 did not apply and the decree could be executed within three years of the accrual of each turn. 7 Mad. 80 distinguished.

The difference in the language of the Limitation Acts of 1871 and 1908 pointed out.

C. S. Venkatachari and *D. Ramaswamy Aiyangar*, for the Appellant.

T. M. Krishnaswami Aiyar, for the Respondent.

T. S. V.

Wallace, J.
6th March, 1924. } S. A. 545 of 1921.

Landlord and tenant—Payment of jodi *and* sirunumera *for* 50 *years—Implied contract to pay—Presumption—Rent free inam.*

A landlord had been collecting from a rent free inamdar in an estate certain amounts as payable towards *jodi* and *sirunumera* for over 50 years. The inamdar subsequently refused to pay the same and the zemindar brought a suit to recover the same.

Held, (1) *sirunumera* being a mere voluntary payment no contract could be presumed from payment for any period however long;

(2) as regards *jodi* though the presumption of an implied contract might otherwise be raised, yet it was negatived by the existence of the original rent free grant on record. 42 Mad. 475 (F. B.) referred;

(3) Nor could plaintiff succeed on the basis of a prescriptive title to the *jodi* as an interest in immovable property in the absence of evidence that the payments were made *virtuete tenurae* or collected from the subsequent altenees of the inam and the original grantees of the same. 1 I. A. 32 distinguished.

Ch. Raghava Rao for *A. Krishnaswami Aiyar*, for the Appellant.

N. Chandrasekhara Aiyar, for the Respondent.

T. S. V.

Ramesam and Jackson, JJ.
6th March, 1924. } A. S. Nos. 25 and 26 of 1917.

Specific performance—Contract to sell—Contract entered into by the manager of the joint Hindu family—Junior members minors—Enforceability of the contract against the minors after the death of the manager.

A contract for the sale of immoveable property entered into by the manager of a joint Hindu family can be enforced against the minor members of the family after the death of the

manager if the contract was necessary or beneficial to the family when it was entered into.

23 M. L. J. 610 followed.

39 C 222 distinguished.

A. Krishnaswami Aiyar, T. V. Muthukrishna Aiyar, N Muthuswami Aiyar and *K. Balasubramania Aiyar* for the Appellants.

S. Srinivasa Aiyangar, K. Rajah Aiyar and *R. Srinivasa Aiyangar* for the Respondents.

C. A. S.

Krishnan, J.
6th March, 1924. } S. A. 939 of 1921.

Guardian—Drawing out money on giving security—Suit by minor after attaining majority—Bar of suit—Remedy—Limitation Act, Art. 132.

The person who acted as the next friend of a minor in two suits withdrew from Court in 1901 the moneys due to the minor on giving security of the same property by two different bonds under O. 33, R. 6, C. P. Code to re-deposit the amount in case he was called upon to do so on account of the minor disputing his acts. The minor attained majority in 1907 and brought a suit in 1909 on the first bond. He obtained a mortgage decree against the property, but it was paid off without the property being sold. In 1916 he applied to the court for an order against the guardian to account for moneys drawn in the second suit or to assign the bond in his favour. The court assigned the bond in his favour and a suit was filed on the same. The court below dismissed the suit on the ground that having sued on the first bond without mentioning the second, bond, his suit was not maintainable and purported to follow 30 Mad. 353. *Held* in second appeal.

(1) The suit was not barred as the property was not sold in execution of the first decree ;

(2) The suit was not barred under O. 2, R. 2, as the defendant was not the guardian generally of the minor but only acted as next friend in two different suits ;

(3) The question whether the remedy was by suit or by execution could not be raised in this suit as the same was

decided by the court in the application by the plaintiff in 1916 and that had become final ; and

(4) The suit was not barred by limitation as the money became due under Art. 132, Lim. Act, at the earliest when the plaintiff attained majority.

T. M. Krishnaswamy Aiyar, P. R. Ramakrishna Aiyar, and *C. S. Swaminathan* for the Appellant.

K. B. Venkatachala Aiyar, for *C. V. Anantakrishna Aiyar,* for the Respondents.

T. S. V.

Phillips and Odgers, JJ.
6th March, 1924. } C. M. A. 322 of 1923.

C. P. C., O. 40, R. 4—Partition Suit—Defendant appointed Receiver—Ordered to pay certain amount—Failure to comply—Whether his share can be attached and sold.

Where in a suit for partition the defendant who is the plaintiff's paternal uncle's son was appointed Receiver, and he was directed by the Court to pay the plaintiff a certain amount out of the estate for the marriage expenses of the plaintiff's sister, and the defendant Receiver failed to pay in spite of several extensions of time, the lower Court ordered the attachment and sale of the Receiver's share for recovery of the amount.

Held, on appeal, that the lower Court was perfectly justified in passing such an order. O. 40, R. 4 clearly applied to the case.

T. V. Muthukrishna Iyer, and *N. Muthuswami Iyer,* for the Appellants.

P. R. Ganapathi Iyer, and *S. R. Dikshit* for the Respondents.

Venkatasubba Rao, J.
6th March, 1924. } S. A. No. 1176 of 1921.

Deed—Construction—Conveyance—Right of way.

A had a plot of land abutting on a road and behind this plot he had considerable properties to which the only access was through the plot. A sold a portion of the plot reserving a

lane for the benefit of his other properties and in describing the northern boundary of the portion sold he stated it as being "a lane 18 feet broad which I am setting apart." *Held* that this description granted the vendee a right of way over the lane even in the absence of an express grant of a right of way under the terms of the document.

Espley v. *Wilkes* 7 Ex, D. 298 and other cases referred to.

T. R. Venkatrama Sastry and *C. V. Mahadeva Iyer* for the Appellant.

A. Krishnaswamy Iyer and *K. V. Ramachandra Iyer* for the Respondent.

A. V. V.

Krishnan, J.
7th March, 1924. } S A. 1115 of 1921.

Evidence Act S.112—Presumption under—Scope of—Divorced woman re-marrying and giving birth to son soon after—Paternity of child—Married woman—Chastity.

A woman who was divorced by her husband re-married within a few days of the divorce and within 2 or 3 months thereof gave birth to a child. *Held,* the presumption under S. 112, Evidence Act applied and the child must be deemed to be the legitimate child of the second husband unless it is proved that the second husband could not have had access to the woman at the time the child could have been begotten. There is no presumption in law that a married woman is chaste.

K. V. Krishnaswamy Aiyar, for the Appellant.

C. V. Ananthakrishna Aiyar, P. S. Narayanaswami Aiyar, and P. S. Ramachandra Aiyar, for the Respondents.

T. S. V.

Jackson, J.
7th March, 1924. } C. M. S. A. 92 of 1922.

Limitation Act, Art. 182—Payment of portion of decree amount—Not in the handwriting of judgment-debtor nor towards interest—If a step-in-aid.

A application to execute a decree passed in 1915 was filed in 1917 ; in 1918 a certain sum was paid towards the decree

debt by the judgment-debtor, but this was neither for interest nor was the fact of payment evidenced by the handwriting of the debtor. An application to execute the decree for the balance was made in 1921 and apart from it there was no certification of payment. *Held*, the payment towards the decree made in 1918 not satisfying the conditions laid down in S. 20, Lim. Act. is not a step-in-aid of execution and the application is barred, 46 Cal. 22 dissented from.

O. T. Govindan Nambiar for the Appellant.

A. Sivarama Menon, for the Respondent.

T. S. V.

Krishnan and Odgers, JJ.
7th March, 1924. } C. R. P. 243 of 1922.

Chit fund—If a lottery—Money paid towards instalments—If recoverable—Contract Act, S. 65—Applicability.

The respondents conducted a chit fund the main rules of which where that there would be 500 subscribers ; each subscriber was to pay one rupee a month for 50 months ; every month two prizes of Rs. 25 were to be awarded by taking lots and if a subscriber got one prize, he was to subscribe thereafter only ½ Re. a month, and after getting two prizes nothing at all. At the end of 50 months, every subscriber then on the rolls was to get back his subscription. The chit was conducted for about 2 years and then stopped. In a suit by a subscriber for return of the subscription paid.

Held *per curiam* the chit fund was a lottery.

Per Krishnan, J. :—The contract to return the subscription is severable from the rest and the taint of illegality will not attach to the plaintiff's claim. (1919) M. W. N. 570 not folld.

Per Odgers, J. : —As there has been a partial performance of the illegal contract, plaintiff who was a party thereto cannot recover. S. 65 of the Contract Act is inapplicable, as the contract is illegal from inception.

Case Law considered.

N. Sivaramakrishna Aiyar, for the Petitioner.

P.C. Sundaram Aiyangar amicus curiae, for the Respondent.

T. S. V.

Ramesam, J.
7th March, 1924 } C. R. P. 559 of 1924.

Promissory note—Attachment—Prohibitory order—Indorsement after attachment—Effect—Rights of indorsee.

Where a promissory note is attached. not by actual seizure but by a prohibitory order on the promisor, such attachment is void and an indorsee after such attachment can sue upon it. O. 21, R. 51 and 46 Mad. 415 referred to.

Even where the indorsee has knowledge of the prohibitory order, he is still a "holder" and can maintain a suit on the note. 46 Mad. 415 doubted.

T. V. Ramanatha Aiyar for Petitioner.

K. V. Sesha Aiyangar and *R. Sitarama Aiyar* for Respondents.

T. S. V.

Madhavan Nair, J.
10th March, 1924. } C. R. P. 867 of 1921.

C. P. Code, S. 115—*Material irregularity—New plea of* res judicata *set up in appeal—Question of title—Small Cause Court—Pleadings and judgment not filed—Question decided on the basis of decree.*

In an appeal arising out of a suit for *jodi* the lower appellate court reversed the decision of the trial court on a plea of *res judicata* which had not been raised either in the pleadings or during the trial in the court below. It held that a question of title had previously been decided by a Small Cause Court in favour of the zemindar and that it was *res judicata.* The only material on record to substantiate this plea was the decree in the Small Cause Suit and neither the pleadings nor the judgment had been exhibited in the case. *Held* the court had acted with material irregularity in the exercise of its jurisdiction to justify interference in revision.

P. Chenchiah for Petitioners.

C. Sambasiva Rao for Respondents.

T. S. V.

N. R. C.

Krishnan, J.
11th March, 1924. } S. A. 257 of 1923.

Contract—Bill of lading—Carriage by sea—Ship commandeered by Government in the middle of voyage—Shipment in another vessel—Liability of consignees to pay extra freight.

Goods were shipped on board a steamer from Liverpool to Cochin under a bill of lading which contained a clause of exemption regarding loss or damage arising from distraint of Princes. Freight was paid in advance at Liverpool. At Bombay the ship was commandeered by the Government and the defendant company gave notice to all the consignees of the fact and asked them to make their own arrangements about the cargo. Later when a steamer was available the defendant shipped the goods to Cochin and charged the consignees the freight etc. from Bombay to Cochin, which was duly paid and the goods were taken delivery of. The consignees then brought a suit for refund of the amount, alleging that as the full freight had been paid in advance at Liverpool, the Company was not entitled to any additional freight. *Held* by the commandeering of the ship at Bombay the contract of carriage contained in the bill of lading came to an end there and the Company was exempted by the clause relating to restraint of princes from transhipping the cargo from Bombay to Cochin. The actual transhipment from Bombay to Cochin must be deemed to be on behalf of the cargo owner and as under the circumstances the transhipment was justified and the consignees enjoyed the benefit thereof and paid the dues, they were not entitled to a refund of the sum paid.

44 Mad. 145, and Carver on Carriage by Sea, p. 415, *etseq.* refd. to.

R. N. Aingar and *O. T. Govindan Nambiar instructed by Messrs. King* and *Partridge* for Appellants.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Respondents.

T. S. V.

Jackson, J.
11th March, 1924. } C. M. S. A. 90 of 1922.

Hindu Law—Stridhanam—Enjoyment of income by widow under husband's will—Decrees obtained but not executed against tenants—Nature of income.

Where a Hindu widow is directed by the will of her husband to enjoy the income of his estate and in pursuance thereof she obtains decrees against tenants for rents due but dies before executing and realising the same, such income is not her stridhanam but forms an accretion to her husband's estate. 42 M. L. J. 253 (P. C) folld.

Quaere, whether 25 Mad. 351 and 28 Mad. 1 are still good law after the decision of the Privy Council in 42 M. L. J. 253 ?

T. V. Ramanatha Aiyar for Appellants. Respondents not represented.

T. S. V.

Krishnan, J.
12th March, 1924. } S. A. 895 of 1921.

Hindu Law—Joint family—Sale deed by elder of two brothers—No recital as 'manager'—Necessity—Father's debts.

In a sale deed by the elder of two brothers in a Hindu family, there was no recital that he executed the deed as manager, but there was a recital that the alienation was made to pay off a debt due by the father. It was found that the alienation was for a necessary purpose. *Held* the sale deed was binding on the younger brother also. 34 All. 296 (P. C.) and the tests laid down by Venkatasubba Rao, J, in 46 M. L. J. 314 at 321 followed,

B. Somayya for Appellant.

N. Chandrasekhara Aiyar for Respondents.

T. S. V.

Krishnan, J.
12th March, 1924. } S. A. 1314 of 1921.

Contract—Sale of goods—Time for payment of price—Vendee obstructed in taking delivery—Right to rescind—Omission—Suit for purchase-money—Liability.

The defendants purchased rice from plaintiff, put them into their gunny bags and left them with the plaintiffs. The contract was silent as regards date of delivery but the defendants were given 12 days time for paying the price When the vendees applied 2 or 3 days after the contract for delivery, the plaintiffs

refused the same unless the price was paid. The price not being paid within the period fixed, the plaintiffs intimated to the defendants their intention to exercise their right of resale, but this was objected to by the latter on the ground the bags were their own.

The vendors then sued for the price of the rice sold. *Held* vendees could not resist the suit, under the contract property in the goods had passed to them and as they did not avail themselves of their right to rescind the contract under S. 39, Contract Act, when the vendors committed a breach of the contract by obstructing delivery, they were liable to pay the price. S. 96 of the Contract Act applied.

P. Bapiraju for Appellants.

V. Suryanarayana for Respondents.

T. S. V.

Madhavan Nair, J.
13th March, 1924. } S. A. 1372 of 1921.

Mortgage—Construction—Interest—Default—Higher rate—Principal payable in 2 years—Higher rate subsequently—If payable.

A mortgage-deed of 1906 provided for payment of interest at 8 per cent every year, the principal being payable in 1908. There was a further clause that in default of payment of interest as provided, interest on interest was payable at 12 per cent and on failure to pay the principal on the due date it was to carry interest at 8 per cent. Default was committed as to both and interest on interest was claimed at 12 per cent even after 1908 ; *held* the provision of 12 per cent interest must be deemed to be with reference to the interest due till 1908, but would not apply to interest subsequent to 1908.

K. G. Srinivasa Aiyar for *K. S. Jayarama Aiyar* for Appellants

T. S. Ramaswamy Aiyar and *V. Sundaram Aiyar* for Respondent.

T. S. V.

Jackson, J.
6th March, 1924.
C. R. P. Nos. 143, 144, 145, 266, 320 and 321 of 1921.

Madras Estates—Land Act, S. 3 (ii) S. 77 and S. 189—Suit for rent—Suit by Zemindar for water-rate from ryots unauthorisedly using water—Suit for water rate against inamdars—Jurisdiction of Revenue Court.

Suits filed by a zemindar for recovering water-rate from ryots for water unauthorisedly taken are suits for rent within the meaning of the Estates Land Act and are properly laid in a revenue Court.

Suits filed for recovering water-rate from service inamdars in the Venkatagiri Estate for water taken without the permission of the Estate officials are, in the absence of proof that the service lands in question were not included in the estate, suits for rent and can be filed in a Revenue Court.

V. Govindarajachari for *A. Krishnaswami Aiyar*, for the Petitioner in all petitions.

C. A. S.

Jackson, J.
7th March, 1924.
C. R. P. No.600 of 1922.

Tenancy in common—Lease of property held by tenants in common—Right of one tenant in common to recover his share of the rent.

Where several tenants in common give a joint lease of immoveable property for a term of years at a consolidated rent, it is open to one of them to sue for his share of the rent.

V. Govindarajachari for the petitioner.

C. Sambasiva Rao and *Natesa Sastri* for the respondents.

C. A. S.

Jackson, J.
7th March, 1924.
C. R. P. No. 827 of 1922.

Civil Procedure Code (V of 1908) *O.* 9—*Whether applies to execution proceedings—Application made more than* 90 *days after knowledge to set aside* ex parte *order in execution—If barred by limitation—Limitation Act (IX of* 1908) *Arts* 164 *and* 173.

Order 9 of the Code of Civil Procedure does not apply to execution proceedings. 4 Pat. L. J. 35 (F. B.) followed.

N. R. C.

Where on an application filed on 26—3—1923, notice was ordered on 10—4—1923 for 24—4—1923 and the return being to the effect that the judgment-debtor refused notice, the Court ordered 'arrest' on 24--4—1923 whereupon the judgment-debtor was arrested on 25—4—1923 and brought before the Court which released him on his furnishing security and the judgment-debtor applied on 28—8—1923 to have the order of arrest dated 24—4—1923 set aside which was done by the lower Court.

Held (i) that the judgment-debtor must at any rate have had knowledge of the order of arrest dated 24—4—1923 when he was arrested and brought before the court and (ii) that the application dated 28—8—1923 was barred whether viewed as an application to set aside an *ex parte* order or as an application for review.

Watrap S. Subramania Aiyar (*A. S. Srinivasa Aiyar* with him), for the petitioner.

R. Kuppusamy Aiyar for the respondent. (See also I. L. R. 4 Pat. L. J. 330 and I. L. R. 17 All. 106.)

C. A. S.

Venkatasubba Rao, J.
11th March, 1924. } C. R. P. No. 212 and 213 of 1923.

Civil Procedure Code (*V of* 1908), *O.* 5, *r.* 1 (2) *and O.* 9 *rr.* 9 *and* 13—*Party absent—Pleader stating no instructions—Whether 'appearance'—Withdrawal of vakalat—If necessary—Remedy of absent party against decision against him—What is.*

Where a defendant who had been served with notice does not appear on an adjourned date of hearing and his pleader states no instructions.

Held (i) that it does not amount to appearance though the pleader does not withdraw his *vakalat* or expessly sever his connection with the trial.

(ii) that the decree passed is nevertheless an *ex parte* decree, which can be set aside in an application under O. 9, r. 13 of the Civil Procedure Code, and

(iii) that the fact that the hearing at which the defendant is absent is not the 'first' but an adjourned hearing makes no difference.

The same rule applies also to a case where the plaintiff is absent at an adjourned hearing and his pleader states no instructions. The dismissal of the suit in such a case is only a dismissal for default and can be set aside on an application under O. 9, r. 9 of the Civil Procedure Code.

I. L. R. 30 M 274 followed.

Watrap S. Subramania Aiyar and *A. S. Srinivasa Aiyar* for the Petitioner.

T. Ramachandra Rao for the Respondent.

[Cf. 18 L. W. 209; 19 L. W. (summary of recent cases) p. 47; I. L. R. 26 Mad. 267; 3 L. W. 254; 17 C. W. N. 627; 19 M.L.J. 760; 18 M.L.J. 51 and I.L.R. 41 Mad. 286 (F. B).]

C. A. S.

Jackson, J.
13th March, 1924. } C. R. P. No. 439 and 440 of 1922.

Civil Procedure Code (V of 1908) *O.* 5, *r.* 17 *and O.* 9, *r.* 13—*Service by affixture—Declaration of sufficiency—Application to set aside* ex parte *decree—Defendant, if duly served.*

Where after three affixtures on the outer-door of the defendant's house, the court declared service sufficient, decided the suit *ex parte* and passed a decree against him which he sought to have set aside on the ground that he was not duly served.

Held, that where after examining the process server, service was declared sufficient it amounted to 'due service' and the decree would not be set aside.

I. L. R. 43 Cal. 447 (F. B.) distinguished.

Watrap S. Subramania Aiyar (*A. S. Srinivasa Aiyar* with him) for the Petitioner.

K. S. Ganapathy Aiyar for the respondent.

C. A. S.

The Chief Justice, Ramesam and Odgers, JJ.
14th March, 1924. } In the matter of a Pleader.

Legal Practitioners Act, S. 13—*Holding a certificate—What is—Expiry of sanad—Proceeding if can be instituted after expiry.*

Proceedings under S. 13 of the Legal Practitioners Act to have a pleader's name struck off the rolls can be instituted

against him, even though at that time the period of his *sanad* has expired by efflux of time and he has taken no steps to have it renewed. He must still be deemed to be "holding a certificate" within the meaning of S. 13.

Pleader not represented.

T. R. Ramachandra Aiyar on behalf of the Vakils, Association.

The Advocate-General (*T. R. Venkatarama Sastry*) in support of the notice.

T. S. V.

Jackson, J.
14th March, 1924. } C. R. P. 477 of 1923.

Transfer of Property Act, S. 6—Michavaram payable under panayam document—If assignable—Suit on—Maintainability.

Where under a *panayam* deed, the properties are placed in the possession of the mortgagee and after appropriating a portion of the income towards interest, he is to pay the balance, a fixed amount, to the jenmi, an assignment of the latter by the jenmi to a stranger does not contravene the provisions of S. 6 (*a*) or (*e*) of the Transfer of Property Act. A suit on such assignment is maintainable. 47 I. C. 563 folld.

T. S. Viswanatha Aiyar for Petitioner.

K. P. Ramakrishna Aiyar and *N. Govindan* for Respondents.

T. S. V.

Krishnan, J.
18th March, 1924. } S. A. 1593 of 1922.

Registration Act Ss. 17, 49—Agreement before mediators—Division of property—Further document to be executed—If admissible without registration—Finding arrived at—Effect.

An agreement was arrived at between the parties to a suit in the presence of mediators as to the way in which properties were to be divided. It was embodied in writing and it further contemplated a right to obtain a further document of partition. *Held*, the document was admissible in evidence even though it was not registered. 46 Mad. 373 (P. C.) folld.

Where such a document is rejected as inadmissible the findings arrived at are vitiated.

T. R. Ramachandra Aiyar and *S. Ranganadha Aiyar* for Appellants.

C. Sambasiva Rao and *Sir K. V. Reddy* for Respondents.

T. S. V.

Jackson, J.
18th March, 1924. } C. R. P. 799 of 1922.

Limitation Act S. 19—Debt under accounts by father—Son agreeing to pay without pleading limitation—If an acknowledgment.

During a Hindu father's life time, his son agreed to pay the former's creditor a debt due after taking accounts and also agreed to pay whatever sum was so found due without pleading limitation. In a suit by the creditor against the son after his father's death, *held* there was an acknowledgment of a valid and subsisting debt by which the son was bound. An acknowledgment under S. 19 need not necessarily be by a person then under a liability to pay. 29 All. 90 folld.

P. Satyanarayana Rao for Petitioner.

G. Lakshmanna and *A. V. Krishna Rao* for Respondent.

T. S. V.

Jackson, J.
18th March, 1924. } C. R. Ps. 21 and 147 to 149 of 1923.

Madras City Tenants Protection Act (III of 1922) *S.* 9*—Applicability—Ejectment decree passed at the time Act came into force—Effect.*

His Lordship directed the above cases to be heard by a Full Bench: the point arising being whether S. 9 of the Madras City Tenants' Protection Act applied to tenants against whom suits or proceedings in ejectment had resulted in decrees or orders at the time the Act came into force.

R. V. Seshagiri Rao and *K. V. Sesha Aiyangar* for Petitioners.

T. L. Venkatrama Aiyar and *P. Sankaranarayanan* for Respondent.

T. S. V.

Spencer and Devadoss, JJ.
18*th March,* 1924. } A. S. 253 of 1921.

Hindu Law—Widow—Alienation—Losses incurred in trade Trade started by husband and by her—Distinction between—Expenses on building.

An alienation made by a Hindu widow to meet losses which she incurred in running a trade commenced by her husband is binding on the estate; but if she starts a new business and alienates property to pay off debts contracted in connection therewith, the reversioners will not be bound.

Where in his life-time the husband had laid the foundation for a building and had collected materials for that purpose, an alienation made by the widow for putting up that structure is binding on the estate.

K. S. Krishnaswamy Aiyangar and *N. Srinivasachariar* for Appellant.

T. M. Krishnasamy Aiyar, C. Krishnamachariar, B. Sitarama Rao and *C. V. Subramania Aiyar,* for Respondents.

T. S. V.

Krishnan, J.
19*th March,* 1924. } S. As. 2 and 1025 1593 of 1921.

Landlord and tenant—Ejectment suit—Notice to quit—Want of notice not set up in written statement or issue raised—If can be raised in second appeal—Assignment after notice by landlord—If Assignee can take advantage of notice.

Where in a suit in ejectment the landlord alleged he had given a proper notice to quit, and the same was not denied in the written statement nor was an issue raised regarding the same, the question of notice cannot be allowed to be raised in second appeal, as it is not a pure question of law and as it will prejudice the rights of the plaintiff.

The assignee from a landlord can take advantage of a notice to quit given by the latter prior to assignment.

2 Mad. 346 ; 90 L. T. 69 distinguished ; 15 I. C. 584 ; 42 I. C. 655 ; 31 M. L. J. 354 folld.

K. P. M. Menon for Appellant.

The Govt. Pleader (C. V. Anantakrishna Aiyar), K. P. Ramakrishna Aiyar and *P. Govinda Menon* for Respondents.

T. S. V.

Spencer and Devadoss, JJ. 21st *March,* 1924 } A. S. 310 of 1921.

Partnership— Malabar Tavazhi—Karnavan entering into partnership with strangers—Dissolution—Karnavan giving up portion of share—Suit by junior members—Maintainability.

Where the karnavan of a Malabar *Tavazhi* enters on behalf of the family and as its representative into partnership with strangers, all the junior members do not thereby become partners; nor can they during the continuance of the partnership maintain a suit relating to the same. 30 M. L. J. 241 and 41 Mad 454 folld.

Where however the karnavan agrees to a dissolution of the partnership taking for his share something less than what the *Thavazhi* was originally entitled to the junior members can, after the dissolution, successfully maintain a suit against the stranger partners for the portion given up by their Karnavan, if they can show there was no consideration for giving up that portion. (1901) 1 Ch. 294; 39 M. L. J. 511 folld.

C. V. Anantakrishna Aiyar and *T. S. Viswanatha Aiyar* for appt.

A. Krishnaswami Aiyar P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* for respts.

T. S. V.

Krishnan, J. 21st *March,* 1924 } S. As. 975 to 989 of 1921.

Madras Land Revenue Assessment Act (*I of* 1876)—*Suit for separate registry—Inamdars—No Kattubadi paid to Zemindar—Effect.*

In a batch of suits by the Zemindar against inamdars for declaring that the suit lands were liable to separately registered under Madras Act I of 1876, the defence set up was that there was no alienation within the meaning of the Act as they were

not *darmilla inams* and as the income of the suit lands was not taken into account in fixing the peishcush. The courts below dismissed the suits on the ground that the Zemindar had never imposed any kind of assessment and that there was an implied contract that the Zemindar should bear the peishcush proportionately on the estate alienated. *Held* the decisions of the courts below should be reversed as no *Kattubadi* or jodi was paid by the inamdars and as wht was transferred was complete ownership of the land. 38 Mad. 1128 ; 41 M. L. J 64 and 19 Mad. 308 folld.

S. Srinivasa Aiyangar and *S. Venkatesa Aiyangar* for appt.

Y. Suryanarayana and *K. Venkatrama Raju* for respts.

T. S. V.

Jackson, J.
20th March, 1924. } C. R. P. No. 764 of 1922.

Madras Estates Land Act, I of 1908, *S.* 77—*Ryot taking water of landholder without permission—Suit by landholder for water-rate—If suit for rent—When.*

Where a ryot unauthorisedly took the landholder's water to raise a wet crop on his dry land. *held.* that the water-rate claimed by the zemindar (at Rs. 5 per acre) would be recoverable as rent in a revenue Court if there was a *mamul* in the estate that water taken without permission should be paid for at that rate; but if the landholder had merely fixed the figure arbitrarily as a fine, the amount could not be recovered as rent unless and until the Collector had ascertained the reasonable rate.

T. Ramachandra Rao, for petitioner.

K. N. Rajapola Sastri, for *B. Satyanarayana* for Respondent.

C. A. S.

Coutts Trotter, C.J., and Ramesam, J.
20th March, 1924. } A. S. No. 336 of 1921.

Interest—Civil Procedure Code, S. 34—*Mortgage deed providing for interest to be added to principal, from date of default—Provision for interest in the mortgage decree.*

Where a mortgage bond provided that interest on the principal sum should be paid regularly at the end of every year and in default of payment it should be added to the principal and from thence compound interest with annual rests should be paid, the decree of the lower Court awarded simple interest, from the date of suit to the date fixed in the decree for payment on the original principal.

Held, reversing the decree of the lower Court that the proper decree is to award interest at the contract rate from the date of suit to the date fixed for payment *i. e.*, on the consolidated amount found due on the date of the institution of the suit, as bond provided compound interest with annual rests. 26 C. 39, at p. 45 (P. C.,) 34 C. 150 at p. 154 (P. C.) 29 M. 170 & 36 All. 220.

N R C

Y. Suryanarayana and *Pappu Satyanarayana* for *P. Somasundaram*, for Appellant.

T. Ramachanara Rao and *V. Krishna Mohan*, for Respondents.

C. A. S.

Jackson, J.
21st March, 1924. } C. R. P. No. 209 of 1922.

*Res judicata—Compromise decree providing for the payment of manibha swatantrams by ryot to land-holder—Right of suit in Civil Court—*Res judicata *on a question of jurisdiction.*

The Rajah of Ramnad sued in the Civil Court to recover arrears of rent, mahamai, road and railway cess and manibha swatantram against the defendants certain cowledars. Manibha swatantram was not agreed to be paid in the cowle deed but the Raja claimed it on the basis of a compromise decree in a previous suit in which the defendants agreed to pay manibha swatantram for future fasles. It was contended in revision that the claim for manibha swatantram could be made only in the Revenue Court in view of the Full Bench decision in 43 M. L. J. 158.

Held that the compromise decree in the previous suit was *res judicata* and that the Civil Court had jurisdiction.

31 M. L. J. 339 followed. 45 Mad. 75 referred to.

V. Thiyagaraja Aiyar for *S. Duraisami Aiyar*, for Petitioner.

S. Sundararaja Aiyangar, for Respondent.

C. A. S.

The Chief Justice and Wallace, J.
21st March, 1924. } Ref. Case No. 10 of 1923.

Income Tax Act (XI of 1922) *S.* 10 (2) *VIII Company tax—District Municipalities Act, S.* 92*—If an admissible item of expenditure.*

Company tax paid under S. 92, Madras District Municipalities Act is an admissible item of expenditure in calculating

the taxable income of a Company under S. 10 (2) of the Income Tax Act.

The Government Pleader (C. V. Anantakrishna Aiyar) for Crown.

T. V. Muthukrishna Aiyar and *S. Chinnaswamy*, for Assessee.

T. S. V.

The Chief Justice and Odgers, JJ. 24th March, 1924. } C. M. A. No. 222 of 1921

Limitation Act S. 7—Joint decree holders—Father and minor sons—Capacity to give discharge—C. P. Code O. 32, R. 6.

A decree was obtained by a Hindu father and his minor sons in a suit in which the former acted as the next friend of the latter. The father died after the decree and the eldest son filed an execution application within 3 years after attaining majority, but more then three years after the date of the decree. *Held* under S. 7 Limitation. Act, time did not run from the date of the decree, as the father who was the next friend of his minor sons could not give a valid discharge without the consent of the court whose permission was necessary under O. 32, R. 6, C. P. Code. 36 Mad. 291 (P. C.) applied.

K. V. Krishnaswami Aiyar and *V. Rajagopala Aiyar*, for Appellants.

A. Swaminatha Aiyar, for Respondents.

T. S. V.

Krishnan and Odgers, JJ. 25th March, 1924. } C. R. P. No. 243 of 1922.

Letters Patent (Madras) Cl. 36—Differing in opinion—Small Cause Revision—Procedure—C. P. Code, S. 98.

Where in disposing of a Civil Revision petition filed under S. 25 of the Provincial Small Cause Courts Act, the Judges composing a division Bench differ in opinion. the opinion of the senior Judge prevails under Cl. 36 of the Letters Patent, 39 Mad. 750 (F. B.) followed ; 25 Mad. 548 dissented from.

S. 98 of the Civil Procedure Code does not apply to the case, as S. 25 of the Provincial Small Cause Courts Act prescribes a special procedure. 45 Bom. 718 (P. C.) followed,

S. 141 C. P. Code does not incorporate S. 98 in its applicability to Civil Revision Petitions.

N. Sivaramakrishna Aiyar, for Petitioner.

P. C. Sundaram Aiyangar, amicus curiae, for Respondent.

T. S. V.

Spencer and Devadoss, JJ.
25th March, 1924. } A. S. No. 190 of 1921.

Mahomadan Law—Settlement—Construction—Gift to sons—Restriction on alienation—Gift over—Will—Consent of heirs—Express or implied.

A Mahomadan donor executed a deed of settlement under which he gave certain properties to his two sons. Later on in the deed, the donor stated that his sons should not dispose of the property but soould maintain themselves out of the income and that the sons of the two donees should take the respective shares of their father with powers of disposal. *Held* on a construction of the deed, that the sons took an absolute estate in the property and that the latter clause in the deed was a restraint on the alienation and therefore void. 51 C. 597 (P. C.) Referred to.

To validate a bequest in favour of an heir under the Mahomadan law the consent of the other heirs is requird and that consent must be given after the death of the testator when the succession opens. The consent may be express or implied from conduct.

T. M. Krishnaswami Aiyar and *K. Narasimha Iyengar*, for Appellant.

S. Varadachariar and *K. R. Narayanaswami Iyer*, for Respondent.

A. V. V.

The Chief Justice and Ramesam, J.
26th March, 1924. } S. As. Nos. 949 and 1341 of 1921.

Madras Land Encroachment Act (III of 1905) *Ss.* 6 ,14—*Notice under—Absence of actual eviction—If starts limitation under S.* 14—" *Deeming themselves aggrieved*"—*What is.*

A person on whom the Collector has served a notice under S. 6 of the Land Encroachment Act, threatening him with actual eviction in case he did not vacate the lands within a time fixed therein, cannot thereby be held to have been evicted so as to make the period of limitation under S. 14 applicable to him.

Where after receiving such a notice, he applies to the Collector to review his order and on the same being dismissed files a suit for declaration of title alleging the rejection order as his cause of action, within six months of that order but more than six months after the notice under S. 6, the suit is not barred under S. 14.

Persons can be held to be "deeming themselves aggrieved" within the meaning of S. 14 according to the particular transaction which they allege constitutes the cause of action. Merely because a notice to quit is served on a person and he applied to get it reviewed he cannot be deemed to have been aggrieved by that notice he does not allege it to be his cause of action.

T. S. Visvanatha Aiyar, for Appellant in S. A. No. 949 of 1921.

P. S. Chandrasekhara Aiyar, for *A. Krishnaswami Ayiar*, for Appellant in S. A. No. 1341 of 1921.

The Government Pleader (C. V. Anantakrishna Aiyar) for Respondent in both Appeals.

T. S. V.

Madhavan Nair, J.
26th March, 1924. } S. A. No. 1442 of 1921.

Lim. Act, Arts. 142, 144—*Suit for land—Pleadings—Dispossession or discontinuance of possession—Vacant land— Law applicable to.*

In a suit for land, where the plaint does not allege a case of dispossession or discontinuance of possession, and the defence set up is only title by adverse possession, and the title of the plaintiff is found in his favour, art. 142, Lim. Act does not apply. 41 All. 669, 39 Mad. 617 (P. C.) and 44 Mad. 883 (P. C.) followed. English cases on the meaning of "dispossession", and "discontinuance of possession" referred to.

16 Bom. 338 lays down a principle relating to adverse possession of vacant lands which can be applied to the Madras Presidency also.

C. S. *Venkatachari*, for Appellant.

P. Elayalwar Aiyangar, and *P. Varadachariar*, for Respondent.

T. S. V.

Venkatasubba Rao, J.
27th March, 1924. } Cr. Rev. Case No. 186 of 1924.

Crim. Pro. Code, Ss. 435, 438, 439. *Proceedings in subordinate Courts—When can be quashed—Criminal misappropriation—Stay of proceedings—Civil appeal pending—Procedure.*

Held on a construction of Ss. 435, 438 and 439 Cr. P. Code that the High Court has power to quash proceedings before subordinate courts at any stage, even when summons alone has been issued to the accused to show cause why he should not be prosecuted for a Criminal offence 22 Cal. 131 ; 25 Cal. 233 ; 39 Mad. 561 referred to.

Where in connection with the receivership of a *kattalai*, the accused was charged with Criminal misappropriation, and the accounts submitted by him had been the subject of an auditor's report based on which a decree of Court was passed, the High Court stayed the Criminal proceedings pending the appeal filed against the order of the Civil Court relating to accounts.

C. S. Venkatachari for the Accused.

The Public Prosecutor (J. C. Adam,) for the Crown.

S. Muthia Mudaliar and *P. S. Narayanaswami Aiyar*, for Complainant.

T. S. V.

The Chief Justice and
Ramesam, J.
27th March, 1924 } Ref. Case, No. 1 of 1924.

Supertax—Company—Surplus profits allotted as shares among shareholders—If liable to tax on such amounts.

Where instead of distributing the surplus profits of a Company as cash dividends to the shareholders, an extraordinary resolution of the Company was passed in pursuance of which the value of each share was quadruped and new scrips issued as taken thereof, the shareholders are not assessable to income-tax on the amount representing such increased value of the shares, as it represents only an accretion to the captial and is not part of their income (1921) 2 A. C. 171 folld ; (1914) A. C. 231 distinguished ; 12 A. C. 409 referred to.

Nugent Grant instructed by L. M. Taylor, for the Assessee.

The Government pleader (C. V. Anantakrishna Aiyar), for the Crown.

T. S. V.

Krishnan and Odgers, JJ.
27th March, 1924.

C. M. A. No. 425 of 1923.

Receiver--Lease by receiver in public auction—Necessity of confirmation by Court—Appeal at the instance of the highest bidder.

A Receiver appointed in a suit derives his powers with regard to the management of the estate in his charge only by express authority and delegation from the court. Unless the delegation is compete in express terms a lease by him in public auction of the lands is subject to the confirmation by Court.

In the case of an auctioneer appointed by the Court unlike the case of an auctioneer under instructions from a private individual, even though the auction is without reserve yet it is subject to confirmation by the Court.

The question of the maintainability of the appeal at the instance of the 3rd party highest bidder at the receiver's auction, the sale in whose favour was not accepted by the Court left open.

K. Narasimha Aiyangar, for Appellant.

T. V. Muthukrishna Aiyar, K. Bhashyam Aiyangar, and *Narasimhachari*, for the Respondents.

C. A. S.

Wallace, J.
27th March, 1924.
C. R. P. No. 851 of 1922.

Civil Proceduce Code, O. 21 R. 90—Execution sale—Application to set aside—Person whose interests are affected—By the sale—Person having a claim for maintenance—Right to apply to set aside the sale.

A Hindu widow who has got a right to be maintained from out of the income of properties forming the estate of the last male owner, but whose right has not ripened into a specific charge on any items of the property, has no *locus standi* to apply to set aside an execution sale of the properties. She cannot be said to be a person whose interests are affected by the sale.

L. A. Govindaraghava Iyer, for Petitioner.

N. Chandrasekkhara Iyer, for Respondent.

A. V. V.

Jackson, J.
19th March, 1924. } C. R. P. 750 of 1922.

C. P. Code, O. 21 R. 90—Right to apply—Hindu Law—Maintenance decree after sale—Charge on properties—If binds auction purchaser—Lis pendens.

In execution of a decree obtained against a Hindu widow for debts due by her husband, certain properties were sold. Before the sale, a suit had been instituted by the mother-in-law of the widow for maintenance, but she did not ask for a charge on any properties. After the sale in execution, a maintenance decree was passed creating a charge over the properties sold and on the basis of that, the mother-in-law applied under O. 21, R. 90, C. P. Code to have the sale set aside. *Held*, (1) she had no *locus standi* under O. 21, R.90 as she was not a person whose interests were affected by the sale, the decree in her favour having been passed only after the sale; and (2) the auction purchaser was not bound by the decree under the principle of *lis pendens* as there was no specific prayer in the plaint for a charge. 19 Mad. 271 folld.

N. Chandrasekhara Aiyar, and *E. Krishnamurthi*, for petitioner.

L. A. Govindaraghava Aiyar, for respondent.

T. S. V.

Odgers, J.
28th March, 1924. } C. M. S. A. 12 of 1922.

Civil Procedure Code, O. 21, R. 83—Applicability—Mortgage decree—Direction in decree for sale of items in particular order—Private sale of earlier item—Application for sale of later item—Maintainability.

O. 21, R. 83, C. P. Code, does not apply to mortgage-decrees.

Where a mortgage decree provided for the sale of properties belonging to various persons in a particular order, but the mortgagee with the consent of some of the mortgagors had an earlier item sold privately and retained the purchase money in satisfaction of a portion of the debt due to him and then applied for a sale of another item for the balance due, *held*, he was not entitled to do so.

N. R. C.

S. T. Srinivasagopalachari, for appellant.
A. Viswanatha Aiyar, for respondent.
T. S. V.

Phillips, J.
1st April, 1924. — S. A. 1440 of 1921.

Limitation Act, Art. 148—Applicability—Refusal to give possession after redemption—Nature of possession—Limitation for suit.

A mortgagor paid the money due under his mortgage, but as there was a clause in the mortgage that he should redeem only at a particular season of the year the mortgagee was allowed to remain in possession. Thereafter he refused to give up possession even when the time arrived. In a suit for possession more than 12 years after such refusal but within 60 years of the same, *Held*, art. 148 would not apply, as the article relates only to suits for redemption or possession against the mortgagee or his representatives in interest. When the mortgagee after redemption refuses to give up possession, the nature of his possession is altered and thereafter he sets up title as owner to the knowledge of the mortgagor and a suit for possession must be filed within 12 years of the date on which the nature of defendant's possession was altered.

6 Bom. 674 , 2 Mad. 228 ; 44 Mad. 253 followed.

A. Ramachandra Aiyar, for appellant.

T. Narasimha Aiyangar, for respondent.

T. S. V.

Phillips and Odgers, JJ.
2nd April, 1924. — Crl. App. 1045 of 1920.

Penal Code, Ss. 149, 326—Conviction under—Absence of charge under S. 149—Effect—Prejudice.

Their Lordships referred to a Full Bench the following question :—

(1) When a charge omitted S. 149 I. P. C. and the conviction is based upon the provision of that section, is that conviction necessarily bad or does it depend on whether the accused has or has not been materially prejudiced by the omission ?

(2) When a charge has been framed under Ss. 326 and 146, I. P. C., is a conviction under S. 326 necessarily bad or does this also depend upon whether the accused has or has not been materially prejudiced by the form of the charge?

V. L. Ethiraj and *T. K. Nambissan*, for appellants.

The Public Prosecutor, for the Crown.

T. S. V.

Phillips, J.
2nd April, 1924. } S. A. 96 of 1923.

Limitation Act, Art. 89—*Pleader and client—Suit for accounts against sons of pleader—Agency—Cause of action—Limitation.*

A person instituted a suit in 1921 for accounts against the sons of his deceased pleader on the footing the latter was constituted an agent in respect of suits entrusted to him in 1916 and which he conducted till his death in 1918. He alleged that a fresh cause of action arose against the sons on the death of the pleader in 1918 and that the suit was in time. *Held,* (1) there was no general agency between the plaintiff and his pleader, but that latter was constituted agent for each suit as vakalat was executed in the same in his favour, and the agency terminated when each suit was disposed of;

(2) The cause of action against the pleader and his heirs is one and the same. Art. 89 of the Lim. Act, applied to the suit for accounts and the claim in respect of suits disposed of more than 3 years before the present suit was barred.

14 Ch. D. 406; 16 M. L. T. 414 followed.

25 All 55; 31 All. 429 not folld.

P. Chenchiah for *P. Venkatramana Rao,* for appellant.

S. Varadachari and *V. Suryanarayana,* for respondent.

T. S. V.

Krishnan and Odgers, JJ.
2nd April, 1924. } C. M. A. 315 of 1923.

Civil Procedure Ss. 47, 63 (2), *O.* 21, *R.* 58—*Money decrees—Attachment by Subordinate Judge's Court and Munsiff's court—Sale by latter—Validity—Position of purchaser—If can object to sale by Subordinate Judge—Procedure.*

Where there are two attachments of the same property under money decrees, one in the court of a Subordinate Judge and the other in the court of a District Munsif, a sale by the latter is quite valid. S. 63 (2), C. P. Code applies irrespective of whether there was notice of the attachment by the superior court. The purchaser at such a sale can apply under S. 47 to the Subordinate Judge for an order that the property should not thereafter be sold by the Sub-court. 43 Mad. 107 (F. B.) applied ; 15 C. W. N. 542 not folld.

An objection that the property is not saleable is one which ought to be inquired into under S. 47, O. 21, R. 58 does not enable the purchaser to apply to the Sub-court to have his objection investigated, as it is confined to cases where the objection is that the property is not attachable and not to cases where the property was rightly attached.

T. M. Krishnaswami Aiyar (*N. Sivaramakrishna Aiyar*, with him) for appellant.

S. S. Ramachandra Aiyar and *V. Ganapathy*, for respondents. T. S. V.

Phillips, J.
2nd April, 1924. } S. A. 1643 of 1929.

*Mortgage—Redemption suits—Two decrees—Appeal in one only—Effect—*Res judicata*—Limitation Act, Art.* 148 *Applicability.*

Two connected suits for redemption were tried together and both were decreed against the appellant. In one of the suits, the properties were not in the possession of the appellant and so he was merely ordered to pay costs, but not exonerated. He preferred an appeal only against that decree which directed him to hand over possession. The lower appellate court held, following certain Allahabad rulings, that as he had omitted to appeal against the other decree the same had become final and the appeal was barred by *res judicata*. *Held*, following 29 Mad. 333 (F. B.) there was no bar of *res judicata* ; the recent ruling of the Privy Council in 46 Mad. 895 has not overruled 29 Mad. 333.

Where a mortgage of 1884 was followed by a sale of the equity of redemption at court auction and purchased by a third

party and thereafter in 1889 the mortgagee purported to buy from the mortgagor his equity of redemption, the nature of the mortgagee's possession becomes altered, and he must be deemed to remain in possession as absolute owner. A suit for redemption or possession thereafter will not fall under Art. 148, Lim. Act. S. A' 1440 of 1921 folld.

T. V. Muthukrishna Aiyar (*T. V. Ramanatha Aiyar* with him), for Appellant.

B. Somayya and *K. Krishnaswamy Aiyangar*, for Respondent.

T. S. V.

Wallace, J.
2nd April, 1924. } S. A. 174 of 1921.

Res Judicata—*Prior suit in ejectment—Dismissal—Appeal—Withdrawal with liberty to sue again--Fresh suit—Maintainability.*

A suit in ejectment was dismissed by the trial court and during the pendency of the appeal, an application for withdrawal was put in, and the court passed thereon the following order:—" Plaintiff is permitted to withdraw with liberty to bring a fresh suit on the same cause of auction. The dismissal of the suit is upheld. Appellant will pay costs of respondents." A fresh suit in ejectment was filed, and on behalf of the defendants it was argued that the dismissal of the prior suit having been upheld, it operated as *res judicata*. *Held*, the real intention of the appellate judge must be ascertained apart from the language used, and what was intended was to reverse the order of dismissal. In this view there was no bar of *res judicata*. 40 Mad. 259 (F. B.) applied.

K. Bashyam Aiyangar, for Appellant.

P. Doraiswami Aiyanger and *Rangaswami Aiyangar*, for Respondent.

T. S. V.

Krishnan and Odgers, JJ.
3rd April, 1924. } C. M. A. No. 469 of 1923.

Provincial Insolvency Act, Ss. 23, 31 —*Scope of—Interim protection prior to adjudication.*

There is no provision in the Provincial Insolvency Act for granting interim protection to a person applying to be adjudicated insolvent prior to actual adjudication. Of the two sections in the Act dealing with the subject, S. 31 applies to cases after adjudication and S. 23 to cases where the person applying is under arrest. When a person is not under arrest, there is no provision for granting interim protection.

M. S. Vaidyanatha Aiyar, for Appellant,

S. S. Ramachandra Aiyar, for Respondents.

T. S. V.

Phillips and Odgers, JJ.
4th April, 1924. } C. R. P. No. 605 of 1923.

C. P. Code, S. 20 (c) Assignment of book debts—Cause of action—Assignee if can sue at place of assignment.

A contract to supply timber was entered into between two parties at a certain place under which a certain sum of money was paid in advance and the timber was to be supplied at another place. On failure to perform the contract, the aggrieved party assigned his right to recover the money paid and for damages to another at a third place. *Held* the assignment gave a right to sue at that place, as the assignment is a part of the assignee's cause of action. 22 Q. B. D. 128 ; 31 M. L. J. 816 followed.

G. Ramakrishna Aiyar, for Petitioner.

K. P. Ramakrishna Aiyar, for Respondent.

T. S. V.

Krishnan, J.
4th April, 1924. } S. R. 12004 of 1923.

Court Fees S. 7 (v) and Sch. I Art. 1—Conditional decree for possession of lands—Payment of money—Appeal relating solely to decree for lands—Court fee payable.

A decree was passed against the defendant in a suit directing him to give up possession of certain lands on payment of Rs. 12,000 to him. The defendant preferred an appeal in which he challenged the decree directing him to give up possession, and did not raise any grounds relating to the amount payable

to him. On a difference arising between the Taxing officer and the appellant as to the court fee payable on the memorandum of appeal, *held*, "the subject matter in dispute" in appeal within the meaning of Sch. I Art. 1 of the Court Fees Act was the land and court fees were payable on its value calculated according to S. 7 (v) of the Act. 45 Mad. 246 and 44 All. 628 referred to.

If the memorandum of appeal related only to the amount of compensation claimed for the lands, then *ad valorem* fees would be payable on the difference between the amount claimed and the amount awarded.

G. Lakshmanna and *V. Vivyanna*, for Appellan,

The Govt. Pleader (*C. V. Anantakrishna Aiyar*,) for the Crown.

T. S. V.

Krishnan and Odgers, JJ.
4th April, 1924. } C. M. A. 324 of 1323.

C. P. Code, O. 38, *R.* 5—*Attachment before judgment—Security bond—Suit dismissed by trial Court but reversed in appeal—Bond if can be proceeded against.*

The plaintiff in a suit applied for attachment before judgment and the defendant gave a security bond in the following terms:—"I give as security all the rights which I have in the property described hereunder for the suit amount. In case the aforesaid suit is decided in favour of the plaintiff, the undermentioned property, myself and my heirs hereby bind ourselves to be responsible for the said amount." The suit was dismissed by the first court, but the appellate court reversed the same and decreed the suit. The plaintiff then proceeded to enforce the security bond. *Held*, he was not entitled to do so, as the suit had been dismissed by the trial court. (1914) M. W. N. 714; 13 W. R. 703; 39 Mad. 903; 12 Bom. 71 folld. 11 L. W. 6 not foll.; 41 Mad. 1053 refd. to; 42 All. 158 (P. C.) (explained and distinguished.

K. Bashyam Aiyangar (*V. C. Veeraraghava Aiyangar* with him), for Appellant.

P. R. Srinivasan, for Respondent.

T. S. V.

[F. B.]

The Chief Justice, Ramesam and Wallace, JJ. *7th April*, 1924. — C. C. C. A. No. 40 of 1922.

Madras City Tenant's Protection Act (III of 1922), S. 9—Applicability—Trustees of religious endowments—If can be compelled to sell land to tenants.

S. 9 of the Madras City Tenants' Protection Act (III of 1922) applies to tenants who are holding lands under trustees of religious or charitable endowments and in an ejectment suit, the latter can be compelled to sell the trust lands to the tenant. Scope of the Act considered ; 46 Mad. 836 overruled.

Per Ramesam, J The deity is the real landlord and the landlord's interest that is directed to be sold under S. 9 is thus the land itself.

Per Wallace, J When the court directs the trustee to sell the land to the tenant, that constitutes "necessity" enabling the trustee to alienate the trust.

V. Sivaprakasa Mudaliar and *C. V. Mahadeva Aiyar*, for Appellant.

N. Chandrasekhara Aiyar, for Respondent.

T. S. V.

[F. B.]

The Chief Justice, Ramesam and Wallace, JJ. *7th April*, 1924. — C. R. Ps. No. 21 and 147 to 149 of 1923.

Madras City Tenants' Protection Act (III of 1922), S. 9—"Has been instituted"—Meaning of—Order in ejectment passed at the time Act came into force—Effect.

S. 9 of the Madras City Tenant's Protection Act applies to the case of tenants against whom orders or decrees in ejectment had been passed at the time Act III of 1922 came into force, but where the ejectment had not actually been carried into effect. 46 M. L. J. 407 folld ; 46 Mad. 836 overruled.

K. V. Sesha Aiyangar, for Petitioner.

T. L. Venkatrama Aiyar, for Respondent.

T. S. V.

[F. B.]

The Chief Justice, Ramesam and Wallace, JJ.
9th April, 1924. } A. S. No. 101 of 1921.

C. P. Code, O. 32, R. 3 (4)—*Appointment of guardian—Consent—Proof.*

Where the question arises whether a guardian appointed under O. 32, R. 3 (4) consented to his appointment as such Courts have to arrive at a conclusion on the point just as on any other question of fact on the evidence adduced in the case. The C. P. Code does not say anything as to the consent required being express or implied.

S. Varadachariar and *K. Ramamurthi* for Appellant.

T. Ramachandra Rao and *A. Krishnaswami Aiyar* for Respondent.

T. S. V.

[F. B.]

The Chief Justice, Ramesam and Wallace, JJ.
9th April, 1924. } A. S. No. 218 of 1921.

Minor—Guardian—Appointment of agent—Suit against—Maintainability.

Where the guardian of a minor appoints an agent and the latter mismanages the estate, the minor can maintain a suit against the agent for accounts and for damages, 43 Mad. 429 overruled.

S. Varadachariar for Appellant.

T. V. Gopalaswami Mudaliar for Respondent.

T. S. V.

Krishnan and Odgers, JJ.
9th April, 1924. } C. M. A. No. 30 of 1922.

Mortgage—Preliminary decree-Order absolute—No final decree passed—Execution application—Maintainability.

A preliminary decree was passed in a mortgage suit on 11—11—1912. The assignee of the decree applied on

30—8—1913 for a recognition of the assignment in his favour and to have the decree transferred to another Court for execution after passing an order absolute under the Transfer of Property Act. All the prayers were granted. On 25—7—1916 an application for execution was put in but it was rejected on 28—7—1916 on the ground that the decree had to be made final before execution could proceed. On 2—12—1918 an application for final decree was put in, but dismissed as unnecessary on the ground that a final decree has been passed already. Then an application to execute was put in, on 25—3—1920. *Held,* it could not be entertained as no proper final decree had been passed. The order absolute cannot be treated as a final decree and the order of 28—7—1916, which said there was no final decree, not having been appealed from had become conclusive between the parties.

C. Padmanabha Aiyangar and *T. D. Srinivasachari* for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

T. S. V.

Spencer and Devadoss, JJ.
9th April, 1924. } A S. No. 166 *of* 1924.

Hindu Law—Alienation—Recitals in documents—Discharge of small debts over long period—Daughters dividing property—Alienation by one—Consent of her sons—Effect.

Where an alienation by a limited owner is being challenged, recitals in the document are strong evidence of representation as to necessity after long lapse of time. Strict proof of necessity is not necessary when the consideration for the alienation was discharge of debts consisting of small items extending over long periods.

44 Cal. 186 (P. C.) followed.

Where after a Hindu's death his two daughters divide his properties and enjoy them separately, an alienation by one of them along with her sons is not void, whatever its effect might be on the rights of the other daughter. The fact of the sons joining in the alienation raises a presumption of necessity and in the absence of rebutting proof, all the

daughters' sons are bound by the alienation after the death of the daughters.

S. Varadachari and *V. Suryanarayana* for Appellants.

V. Ramadoss and *K. Venkatarama Raju* for Respondents.

T. S. V.

Waller, J.
10th April, 1924. } C. S. No. 332 *of* 1922.

Letters Patent (Madras), Cl. 12—*Leave to sue—Pro-note maker dead—Legal representative—Cause of action.*

In a suit on a promissory note filed in the Original Side of the High Court, the plaintiff alleged that the note was executed at Madras. The maker of the note was dead and the defendant, a person ordinarily residing at Tanjore, was alleged to be his legal representative, being either his adoptive mother or a person who intermeddled with the estate of the deceased. No leave to sue was obtained. *Held,* part of the cause of action, *i. e.,* the liability to be made the legal representative arose outside Madras and hence leave to sue was necessary.

E. L. Thornton and *T. D. Srinivasachari* for Plaintiff.

V. V Srinivasa Aiyangar and *K. S. Venkataramani* for Defendants.

T. S. V.

Krishnan and Odgers, JJ.
10th April, 1924. } C. R. P. No. 739 *of* 1922.

Civil Procedure Code, S. 2 (11)—*Legal representative—Joint Hindu family—Death of father or manager—Right of other co-parceners to represent the estate.*

Where the father of a joint Hindu family sues for recovery of family properties and dies pending the suit, the surviving co-parceners are the legal representatives of the deceased within the meaning of S. 2 (11) of the C. P. Code and are entitled to be impleaded as such. 42 Bom. 504 dissented from.

T. M. Krishnaswami Aiyar and *K. Balasubramania Aiyar* for Petitioner.

F. S. Vaz for Respondent.

Phillips, J.
11th April, 1924. } S. A. No. 900 *of* 1921.

Hindu Law—Inheritance—Daughters—Division of property —Effect of —Rights of survivorship.

Two daughters of a deceased Hindu who had succeeded to the property of their deceased father partitioned the property between themselves with powers of alienation and the document contained the following words

"Hereafter we shall only be friends and shall have no relationship with the property. *Held* the words were sufficient to exclude the right of survivorship between them. 45 M. L. J. 1; 46 M. L. J. 285 followed.

K. V. Krishnaswami Aiyar and *A. N. Krishna Aiyangar* for Appellant.

The Advocate General and *K. S. Venkatramani* for Respondents.

Krishnan and Odgers, JJ.
11th April, 1924. } C. M. A. No. 219 *of* 1924.

Hindu Law—Will—Construction—Right of enjoyment to female heirs—Nature of estate given.

The will of a Hindu testator contained in its operative portion the words, "The following are the particulars in which my properties are to be enjoyed" and he devised his estate to some of his female relations. *Held* in the absence of words limiting the nature of the estate conveyed, they took an absolute estate in the properties. The use of the word "enjoy" did not restrict it to a life estate.

10 L. W. 620 followed; 33 Mad. 91; 44 M. L. J. 23 45 Mad. 329 (P. C.) referred to.

S. Varadachari for Appellant.

K. V Krishnaswami Aiyar (for the Advocate General) and *P. K. Janakiraman* for Respondents.

T. S. V.

Madhavan Nair, J.
9th April 1924. } S. A. 754 of 1921.

Hindu Law—Joint family—Debt by father—Subsequent partition—Decree against father—Son's share if liable.

A Hindu father borrowed money on a pro-note and then effected a partition between himself and his son. The creditor subsequently obtained a decree against the father and tried to execute it against the son's share. *Held* he could do so unless the son shows the debt was for an illegal or immoral purpose. A. S. No. 175 of 1921 followed.

C, Narasimhachari for appellant.

K. P. Ramakrishna Aiyar for respondent.

T. S. V.

[F. B].

The Chief Justice.
Ramesam & Wallace, JJ.
11th April 1924. } C. R. P. 633 of 1922.

Limitation Act S. 5—Rule framed by Madras High Court—Extension of section to O. 9 R. 13 C. P. Code—If ultra vires *—By or under any enactment—Change in language—Effect.*

The rule made by the Madras High Court under its rule making powers extending S. 5 of the Limitation Act to O. 9 R. 13 C. P. Code is perfectly *intra vires*. 32 I. C. 975 followed.

S. 5 contains within itself an indication that rules could be framed making them applicable to other matters also. The recent amendment of the words ' by any enactment or rule " into ' by or under any enactment ' only makes the expression more elegant and does not introduce any change in the law.

K. S. Ramabhadra Aiyar for petitioner.

A. Swaminatha Aiyar for respondent.

T. S. V.

NRC

[F. B]

The Chief Justice,
Ramesam & Wallace, JJ. C. R. P. 899 of 1922.
11th April 1924.

C. P. Code O. 9 *R.* 8—*Pleader instructed only to ask for adjournment— Facts endorsed on plaint —Dismissal —Setting aside —If there has been appearance—Withdrawal—What amounts to —O.* 3 *R.* 4 (2).

On the day of hearing of a suit, the plaintiffs' pleader appeared in Court and applied for an adjournment, which was refused. He reported in Court that his instructions were only to ask for an adjournment and made an endorsement to that effect on the back of the plaint. *Held* it amounted to a withdrawal within the meaning of O. 3 R. 4 (2). Even if the Court did not record a formal order granting leave to withdraw the same could be implied.

Where after the adjournment was refused, the Court dismissed the suit, the dismissal is one for non-appearance under O. 9 R. 8 and it is open to the Court to set it aside under O. 9 R. 9 if sufficient cause is shown. 23 All. 220 (P. C.) referred to.

P. V. Krishnaswami Aiyar for petitioner.

A. Swaminatha Aiyar for respondent.

T. S. V.

Madhavan Nair, J.
S. A. No. 74 of 1924.
11th April 1923.

Mortgage —Prior and subsequent —Suit by each mortgagee without impleading the other—Purchase at execution sale—Suit for redemption by purchaser—Limitation Act, Arts. 132 *and* 148.

There were two simple mortgages on a property. The prior mortgagee obtained a decree for sale on his mortgage and in execution purchased the property and took possession without impleading the puisne mortgagee as a party to the proceedings. Later on the puisne mortgagee obtained a decree for sale and purchased the property in execution without impleading the prior mortgagee as party. More than 12years from the date of the puisne mortgage, but within 60 years of the prior mortgage, the puisne mortgagee purchaser

brought a suit for redemption of the prior mortgagee purchaser. *Held,* (1) that the right of the puisne mortgagee to redeem the prior mortgagee is only ancillary to his right to enforce his security; (2) that the suit to enforce the second mortgage was barred under Art. 132 of the Limitation Act; (3) and therefore, the present suit was also barred by limitation

T. M. Krishnaswami Aiyar for appellant.

C. S. Venkatachariar for respondent.

A. V. V.

Philips and Madhavan Nair, JJ.
16th April 1924, } S. A. 1146 of 1921.

Foreign Judgment—Suit on—Summary Chapter suit—Summons served on sub-agent—Ex parte decree—If a decision on the merits—Submission to jurisdiction.

The plaintiff filed a suit in Tanjore on a foreign judgment he had obtained against the defendant in Colombo. That was a decree in a Summary Chapter suit. The defendant who was trading at Colombo had given a general power of attorney, with power to appoint sub-agents and in pursuance thereof the agent had appointed a sub-agent to act during his absence. The summons in the Colombo suit had been served on the sub-agent and an *exparte* decree passed. In the suit brought on the foreign judgment the defendant contended that the summons had not been duly served either on himself or his agent and also that an *exparte* decree in a summary suit would not be a decision on the merits. *Held,* the question of sufficiency of service of summons was for the Colombo Court to decide and it could not be gone into in a suit brought on that judgment. (1899) 1 Ch. 781; L. R. 6 Q. B. 139 followed.

Held also, the granting of a general power of attorney constituted submission to jurisdiction. 37 Mad. 163 followed; 40 Mad. 112 distd; also, a finding given *exparte* is a decision on the merits when evidence is gone into.

B. Sitarama Rao and *K. Sundara Rao* for appellant.

T. L. Venkatarama Aiyar for respondent.

T. S. V.

Philips and Madhavan Nair, JJ.
17th April 1924. } S. A. No. 947 of 1921.

Mortgage—Redemption—Co-sharers—Right of—Safeguarding rights of other sharers.

One of several co-sharers of the equity of redemption can maintain a suit to redeem the whole mortgage, provided the interests of the other co-sharers in the mortgage are safeguarded 48 Cal. 22 (P. C.) followed ; 22 Mad. 209 ; 38 Mad. 310 referred to.

K. V. Madhavan Nair for *Govinda Marar* for appellants.

C. V. Anantakrishna Aiyar for respondent.

T. S. V.

Philips, J.
22nd April, 1924. } S. A. 1446 of 1921.

Evidence Act S. 90— Old documents— Presumption of genuineness—Period of 30 years—Time how calculated.

The period of thirty years mentioned in S. 90 Evidence Act should be calculated not at the time when the document is tendered in evidence but at the time when its genuineness is being considered by the court.

9 C. L. R. 135 ; 4 Lah. 233 ; 42 I. C. 80 folled.

R. Rajagopala Aiyangar, for appt.

S. Varadachari and *T. V. Ramanatha Aiyar*, for respt.

T. S. V.

Wallace, J.
22nd April, 1924. } C. R. P. 920 of 1922.

Madras Local Boards Act (XIV of 1920) S. 79—Lease for tapping trees—Darmila inam—Liability to pay land cesss

A person who took a lease for tapping date trees in a *darmilla* inam in a zemindari has no interest in the land on which the trees are grown and is not liable to pay half the land cess paid by the intermediate landholder to the superior landlord. 12 Mad. 203 and the case of tree pattas in ryobtrass tracts distinguished.

B. Satyanarayana for petr.

P. Somasundaram and *P. Satyanarayana*, for respt.

T. S. V.

Wallace, J.
22nd April, 1924.
C. M. P. No. 378 of 1924.

C. P. Code, Ss. 21, 24—*Objection to place of suing—Issue raised—Transfer* suo motu *by District Judge—Application for re-transfer.*

In a suit filed in Court A, objection was raised to the forum of suit on the ground none of the suit properties lay within its jurisdiction. An issue was raised on the question of jurisdiction, but the District Judge subsequently transferred the case *suo motu* to court B. An application for re-transfer to court A was put in on the ground that the order of the District Judge was without jurisdiction inasmuch as the objection regarding forum of suit had not been decided. *Held* (1) as the objection was only to the place of suing under S. 21, it was not a case of inherent want of jurisdiction; and (2) it was open to a defendant who raised the objection to admit the facts which give jurisdiction even before the High Court.

G. Lakshmanna and *K. Kameswara Rao* for Petitioners.

A. Krishnaswami Aiyar and *P. Satyanarayana Rao* for Respondents.

Wallace, J.
22nd April, 1924.
C. M. S. A. No. 105 of 1922.

C. P. Code O. 21, *R.* 2 *and O.* 32, *R.* 6—*Decree in favour of a major and two minor brothers—Satisfaction entered—No sanction of Court—Subsequent application for execution—If maintainable—Payment to one of several joint decree holders—Effect.*

A decree was passed in favour of three brothers, one of whom alone was a major and who acted as the guardian of his minor brothers. The major received the money due and entered satisfaction. Subsequently all the brothers applied again to execute the decree. *Held* (1) the question of satisfaction could be gone into under O. 21, R. 2 as it had been certified to court ; (2) two of the decree-holders being minors, sanction of court was necessary under O. 32 R. 6 for receipt of money and hence satisfaction could not be recorded. 36 Mad. 295 (P. C.) folld ; and (3) in the case of a joint decree there can be no partial satisfaction out of court by payment to some only of the decree holders. 31 M. L. J. 93 ; (1918) M. W. N. 507 ; 25 Mad. 431 followed.

N R C

V. N. Venkatavaradachariar and *A. Srirangachariar* for Appellant.

K. Bashyam Aiyangar and *N. Kunchitapadam* for Respondent.

T. S. V.

Madhavan Nair, J.
23rd April, 1924. — S. A. No. 1387 of 1921 and No. 79 of 1922.

Hindu Law—Family arrangement—Partition suit—Agreement to adopt—Division of properties—Validity—Public policy.

In a suit for partition and recovery of possession, the parties entered into a compromise under which the defendant was to adopt the son of the plaintiff in two months in which event the defendant and his adopted son were to enjoy absolutely the family property and in default plaintiff was to be entitled to a moiety of the property. A decree was passed in terms thereof and thereafter the defendant sued to set aside the compromise decree as being void on the ground the condition as to adoption was opposed to Hindu Law and public policy and that the result contemplated on failure to make the adoption was in the nature of a penalty.

Held the provisions about adoption in the decree were legal and valid and were in the nature of a family arrangement and the forfeiture clause in it was not penal.

A. Krishnaswami Aiyar, P. Somasundaram and *K. Venkatramaraju* for Appellants.

S. Varadachariar and *V. Suryanarayana* for Respondents.

T. S. V.

[F. B.]

The Chief Justice, Ramesam and Wallace, JJ.
24th April, 1924. — A. S. No. 7 of 1921.

Madras Estates Land Act, S. 153—Lease for less than 5 years—Holding over—Suit in ejectment—Forum—Civil Court Jurisdiction.

A ryot who held over after the expiry of a lease for less than five years after the Estates Land Act came into force has sued in ejectment in a Civil Court. *Held* S. 153 was exhaustive

as to the grounds on which such a suit could be based but not as to the form. A civil court has jurisdiction to entertain the suit. 33 M. L. J. 757 and the view of Oldfield, J. in 29 M. L. J. 184 dissented from ; the view of Spencer, J. in 26 M. L J. 285 followed.

A. Krishnaswami Aiyar and *A. N. Krishna Aiyangar* for Appellant.

V. C. Gopalaratnam for *V. V. Srinivasa Aiyangar* for Respondents.

T. S. V.

[F. B.]

Spencer, Krishnan and Ramesam, JJ.
24th April, 1924. } Crl. Appeal No. 1045 of 1923.

Penal Code, Ss. 149 *and* 325—*Charge under—Conviction under S.* 326 *alone, if illegal—Prejudice—Effect.*

Where the accused are charged with offences under Ss. 149 and 326, Penal Code, but are convicted only under S. 326, the conviction is not illegal. If the accused shows prejudice, the conviction can be set aside. 9 All. 645 folld ; Calcutta decisions dissented from, on the ground they contain no reference to S. 535, Cr. P. Code.

V. L. Ethiraj and *T. K. Nambisan* for Appellants.

The Public Prosecutor (*J. C. Adam*) for the Crown.

T. S. V.

Venkatasubba Rao, J.
24th April 1924. } Crl. Rev. Case Nos. 206 and 207 of 1924.

Criminal Rules of Practice (*Madras*) *R.* 141—*Applicability—High Court—Advocate—Memorandum of appearance—Criminal revision case.*

R. 141 of the Madras Criminal Rules of Practice applies to the High Court also, and where an advocate files a Criminal Revision case in the High Court, he is bound to file a memorandum of appearance and pay thereon the fee prescribed under the Court Fees Act.

The Government Pleader (C. V. Anantakrishna Aiyar) for the Crown.

F S Vaz on behalf of the Bar Association.

T. S. V.

Odgers, J.
24th April, 1924. } C. R. P. No. 876 of 1922.

*Guardians and Wards Act, S. 43 (1)—Order concerning property—Court if can pass orders against stranger—*De facto *guardian.*

Under S. 43 (1) of the Guardians and Wards Act, the District Court has no jurisdiction to pass any orders on the application of a person interested in the minor against any person other than the Court guardian or the minor. The fact that the minor was in the custody of a certain person before the Court appointed a guardian does not entitle the court to pass an order against him under S. 43 (1). 36 M. L. J. 189 distinguished ; 10 M. L. T. 483 followed.

A. Vasudeva Menon for Petitioner.

V. Narasimha Aiyangar for Respondents.

T. S. V.

Devadoss, J.
25th April, 1924. } C. R. P. No. 221 of 1922.

C. P. Code, O. 5, R. 19—Affixture by notice—Date of return uncertain—Decree ex parte*—If can be set aside.*

An *ex parte* decree was sought to be set aside on the ground the defendant was not duly served. It was proved that there was affixture by the process server to the outer door of the defendants' house on two occasions when the latter was temporarily absent from his residence and his officials could not say when he would return. *Held* the service was sufficient and the decree could not be set aside on that ground. 21 Mad, 324 followed ; 43 Cal. 449 (F. B.) distinguished.

V. Ramadoss for Petitioner.

V. Suryanarayana for Respondents.

T. S. V.

[END OF VOL. XLVI.]